No. 80-502

Supreme Court, U. S.
FILED
SEP 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

ROGER R. FLOREY, on his own behalf and on behalf of his minor son, JUSTIN B. FLOREY; DAVID R. GROETHE, MARILYN DAY, EVELYN GRIESSE, and MARILYN FUSFIELD,

Petitioners,

v.

SIOUX FALLS SCHOOL DISTRICT 49-5; RICHARD L. BOHY, President of the Board of Education; DORIS LARSON, DAVID BRANDT, PAM NELSON and JOHN SIMKO, JR., Members of the Board of Education and DR. JOHN W. HARRIS, Superintendent of Schools and their agents, employees and successors,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

QUESTIONS PRESENTED

1. Whether school district rules which expressly provide that religious holidays "may be observed in the public schools" and that religious music, literature and symbols may be used during these holiday observances to portray "the cultural and religious heritage of the particular holiday" violate the Establishment Clause of the First Amendment.

2. Whether those rules, as applied, unconstitutionally favor and establish religion over non-religion, or one religion over others.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported at 619 F.2d 1311 (8th Cir. 1980, and is reprinted in the Appendix at A-1. The decision of the United States District Court for the District of South Dakota is reported at 464 F.Supp. 911 (D.S.D. 1979), and is reprinted at A-76.

JURISDICTION

The judgment of the Eighth Circuit was filed April 22, 1980. A. 103. A timely petition for rehearing was denied by an equally divided court on May 20, 1980. A. 105. The time in which to file a petition for a writ of certiorari was extended until September 17, 1980, by order of Mr. Justice Blackmun dated July 26, 1980. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND SCHOOL DISTRICT RULES

1. The Establishment Clause of the First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion....

2. Sioux Falls School District Rule 6141.2:

> Observance of Religious Holidays
>
> The practice of the Sioux Falls School District shall be as follows:
>
> 1. The several holidays throughout the year which have a religious and a secular basis may be observed in the public schools.
>
> 2. The historical and contemporary values and the origin of religious holidays may be explained in an unbiased and objective manner without sectarian indoctrination.*

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*The constitutionality of this provision was not challenged by the petitioners.

3. Music, art, literature and drama having religious themes or basis are permitted as part of the curriculum for school-sponsored activities and programs if presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday.

4. The use of religious symbols such as a cross, menorah, crescent, Star of David, creche, symbols of Native American religions or other symbols that are a part of a religious holiday is permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature. Among these holidays are included Christmas, Easter, Passover, Hannukah, St. Valentine's Day, St. Patrick's Day, Thanksgiving and Halloween.

STATEMENT OF THE CASE

1. All petitioners are taxpayers and citizens of Sioux Falls, South Dakota, and one of them is a parent of a student in the respondent school district who sues on his own behalf and on behalf of his son. Respondents are the Sioux Falls School District 49-5 and several of its officials, including all members of the governing Board of Education (hereinafter, "District").

Religious holidays have been observed in the public schools of Sioux Falls for years. In 1977, many parents and citizens had objected to these observances as sectarian and, hence, violative of the First Amendment. In response to these objections, the School Board established a committee to study the issue. The committee proposed Guidelines to deal with the problem. Tr. 77-80. The first of

these Guidelines provided that holidays "which have a religious and a secular basis may be observed in the public schools." The Board of Education, in early December, 1978, adopted the Guidelines as proposed, rejecting an amendment which would have permitted schools to observe only the secular--and not also the religious--basis of holidays. Tr. 67-68. All of the 1978 Christmas programs were conducted in accordance with these Guidelines, Tr. 80-82, and these programs therefore represent the best indication of the breadth of the Guidelines as interpreted by the defendants.

2. Petitioners commenced this action in November, 1978, seeking declaratory and injunctive relief against the enforcement of the Guidelines because they sanction and permit sectarian holiday observances in the public schools. Petitioners also

challenged the Guidelines as applied because the programs being conducted under them were religious activities. The District Court's jurisdiction was invoked under 28 U.S.C. §1343(3).

On December 7, 1978, the District Court held a hearing on plaintiffs' motion for a preliminary injunction.[1/] During that hearing, the parties stipulated into evidence the Guidelines as well as twenty-one Christmas programs scheduled to take place in the District's schools later that month.[2/] The Superintendent of Schools and

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1/ This hearing was consolidated with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). All references to the record of these proceedings are cited as "Tr. ."

2/ These programs, and the religious songs performed as part of these programs, were Plaintiffs' exhibits 1 and 2 in the court below.

the District's Director of Music testified that each of these programs was authorized by and was consistent with the Guidelines. Tr. 53, 80-81.

Every one of these twenty-one programs explained the religious significance of Christmas, either through song or drama.[3/] The Garfield Elementary School, for example, conducted its Christmas program on December 21, 1978. Featured were five

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3/Judge McMillian summarized the nature of these Christmas assemblies in his dissent below:

> [T]he assemblies are typically concerts which feature traditional Christmas music and songs, including Christmas carols such as "Silent Night" and "Come All Ye Faithful"; the assemblies are usually held during the evening at the particular school; assembly attendance is not compulsory and students could excuse themselves; assembly activity is not graded but assembly preparation is part of the general classroom work and may involve as much as two months of the school year (this time is, of course, not devoted entirely to assembly preparation). A 47-48.

Christmas hymns, including "He Whom Joyous Shepards Praised."[4/] The lyrics to this song are as follows:

> "He whom joyous Shepards praised,
> When the angels' song was raised,
> Bidding them be not amazed,
> Heaven's all glorious King is born.
>
> Sing to Christ, the King who reigneth,
> Yet of Mary manhood gaineth,
> Born our God; let us adore Him:
> Glory be to God on high."

Students at South Sioux Elementary School performed the song "Mary's Boy-Child" during their Christmas program:

4/The four other hymns performed during Garfield's 1978 Christmas assembly were "How Far to Bethlehem," "The Innkeeper's Carol", "O Little Town of Bethlehem" and "If Christmas Isn't Love." Almost half of the songs performed during the assembly were Christian hymns, the remainder were "seasonal" songs, such as "Deck the Halls with Boughs of Holly."

"A long time ago in Bethlehem--
So the Holy Bible says--
Mary's Boy-Child, Jesus Christ,
Was born on Christmas Day.

Hark now, hear the angels sing:
'A new King is born today,
And man will live forever more,
Because of Christmas Day.'

Trumpets sound and angels sing,
Listen to what they say:
That man will live forever more,
Because of Christmas Day."

Many elementary school teachers had their students perform plays as well as sing songs in their Christmas programs.5/ For example, a first grade class at the Emerson Elementary School performed "The Tree That Trimmed Itself," in which students, dressed as snowflakes and pine trees, try to decide what gifts to bring Jesus on His birthday. During the play the children sang:

5/ In addition to the plays described here, one additional play is discussed below at 23-24.

"What shall I give to the child
in the manger?
What shall I give to the beauti-
ful boy?
Grapes will I bring to Him;
bread from the oven;
Baskets of food for the child
to enjoy.
Tan-ta-ran-tan when the gifts
have been opened.
Tan-ta-ran-tan they will add
to His joy."

A play performed at the Emerson Elementary School entitled "Who is The Greatest?" featured a "debate" between St. Nicholas, a Christmas Tree, a Yule Log, and the Star of the East as to who played the most important role at Jesus' birth. The Star claims that it did because "I guided the Wisemen to the Baby Jesus." Religious music was sung throughout the play, such as "The children stand, with their eyes all shining/ with laughing hearts and with faces gay./ They see the lights of the Christmas story/ and of the Baby upon the hay." At the end of the

debate, the "children of the jury" render their decision: "You All are the Greatest."

Respondents denied that these Christmas programs, or the Guidelines on their face, violated the Establishment Clause. They contended that holiday observances were included in the curriculum to teach children about the cultural and religious significance of holidays and not to promote religion itself. The District's Director of Music, for example, testified that songs with religious content were sung in order to provide students with a complete musical education. Tr. 85-86. However, respondents introduced no evidence that there was any educational need for those songs to be performed contemporaneously with the observance of a religious holiday, or at a holiday assembly at which

parents and other non-students were present.

The District Court, terming the issue "close," A.85, found that, although the 1977 programs had unconstitutionally established religion, the new Guidelines would be constitutional if they were properly administered. A.86. The District Court's Opinion does not refer to any of the 1978 Christmas programs introduced into evidence, inexplicably failing to address one of the principal questions raised by plaintiffs: whether observance of religious holidays by those programs violated the Establishment Clause.

3. On appeal, the Court of Appeals affirmed 2-1. The majority held the Guidelines to be facially constitutional under the Establishment Clause. It refused to pass on the constitutionality of the Guidelines as applied because, it said,

the District Court had not made findings of fact sufficient to permit it to pass on that issue.[6/] A. 4-5. Judge McMillian dissented because he found the Guidelines unconstitutional on their face and as applied.

A petition for rehearing and rehearing en banc was denied by an equally divided court, with four of the eight active Circuit Judges dissenting. A. 102.

6/The majority also concluded that the Guidelines did not violate the Free Exercise Clause. A. 27-28. But plaintiffs had not alleged a free exercise violation in their complaint, and do not raise that issue here.

REASONS FOR GRANTING THE PETITION

The Court Below Resolved An Open Constitutional Question of Nationwide and Recurring Importance in a Manner Inconsistent with Prior Decisions of this Court.

The decision below is the only reported decision passing upon an important question of federal constitutional law -- the extent to which religious holidays can constitutionally be observed in the public schools.[7/] That decision is

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7/ The only other judicial decision we are aware of on the precise issues presented in this case is the unreported decision of the trial court in Chamberlin v. Dade County Bd. of Public Instruction, 143 So.2d 21, vacated, 374 U.S. 487 (1963), on remand, 160 So. 2d 97, rev'd in part, 377 U.S. 402 (1964), enjoining religious observances of the Christmas, Hannukah and Easter holidays, 143 So. 2d at 23. The school board did not appeal from that part of the order, so that issue was not passed upon by either the Florida appellate courts, 143 So. 2d at 35, or by this Court. These issues were also presented, but not resolved, in Committee Against Religious Encroachment in Schools v. Bd. of Education, Civ. No. 1841-72 (D. N.J. 1972).

inconsistent with prior and controlling decisions of this Court.

The controversy over religious holiday observances in the public schools is nationwide in scope, affecting virtually every public school in the country and millions of students. Numerous state and local school boards have issued guidelines in an attempt to regulate these practices in a manner consistent with both the Constitution and the popular will.[8/] The

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8/See Note, Religious Holiday Observances in the Public Schools, 48 N.Y.U. L. Rev. 1116 (1973). At least one state, Massachusetts, enacted a statute, Mass. Gen. Laws ch. 71 31-A (1980), on the subject designed to overrule guidelines issued by the State Commissioner of Education which the legislature deemed too restrictive. Not surprisingly, the guideline-writing process, taking place in the absence of a controlling decision of this Court, has frequently resulted in bitter sectarian conflicts, giving rise on occasion to religiously-based boycotts. See L. Pfeffer, Church, State and Freedom, 479-96 (2nd ed. 1967); Religious Holiday Observances in the Public Schools, supra, 48 N.Y.U. L. Rev. at 1128.

legal and policy questions raised by these religious holiday observances have generated much debate in legal,[9] educational,[10] and general publications,[11] but until the decisions below, this debate and guideline-writing process has proceeded without explicit judicial guidance. Unless reviewed by this Court, the decisions below are

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9/Note, Religious Holiday Observances in the Public Schools, supra, note 8; L. Pfeffer, supra, note 8; Oregon Op. Att'y Gen. 7020 (1975)(noting absence of case law); Cal. Op. Att'y Gen. (12/7/62).

10/ M. Nolte, Courts Clarify Holiday Conflicts, Am. School Bd. J. at 39; C. Fowler, The Christmas Carol Hassle, Musical America at 14, December 1979; Religion and the Public Schools, Education Digest, December 1979 (Christmas music most common cause of complaint about religion in the public schools); G. Drotman, Take the Crisis Out of Christmas, Learning at 62, November 1973.

11/Caroling Crisis, Time, December 17, 1979; R. Nixon, "Jingle Bells" v. "Silent Night", Liberty, November-December, 1979; P. Buchanan, Silencing "Silent Night" in the Schools, N.Y. Daily News (December 27, 1978).

likely to result in the widespread adoption of similar rules throughout the nation.[12/]

This Court has consistently held that public schools may teach about religion in a neutral fashion, but that religious observance or indoctrination or exercises of a "religious character" have no place in the public schools, even when designed to further a secular purpose. Epperson v. Arkansas, 393 U.S. 97 (1967); School District of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Zorach v. Clausen, 343 U.S. 306 (1952); Illinois

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12/Counsel are informed that school boards in Decatur, Arkansas and Reno, Nevada adopted these Guidelines subsequent to the decision of the District Court in this case. Counsel are also aware of two school districts which, as a result of the decisions below, are on the verge of reinstituting Christmas activities previously eliminated.

ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948). This salutary constitutional principle has allowed the public schools to remain free of divisive sectarian conflicts while affording students an education encompassing the full range of human experience, including the study of religion. The judgment below seriously misconceives the critical difference between teaching about, and observing, religion.

The conflict between the decision below and prior rulings of this Court is apparent whether that decision is analyzed in light of this Court's decision in Schempp condemning governmental sponsorship of school exercises of a "religious character" or the tripartite test enunciated in cases such as Committee for Public

Education and Religious Liberty v. Regan, 444 U.S. 646 (1980) and Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 746 (1973).

A. The Decision Below is Inconsistent with Schempp.

In Schempp, this Court held that the reading of Biblical passages without further comment at the beginning of the school day unconstitutionally established religion. 374 U.S. at 223-24. It reasoned that, even if the purpose of the exercise was not religious, the use of an "instrument of religion," to promote a secular goal, together with governmental sponsorship of an exercise with a pervasively religious character, 374 U.S. at 224, was inconsistent with the Constitution. The Guidelines here challenged authorize activities far more pervasively religious

than those condemned in Schempp and are a fortiori unconstitutional.

These Guidelines do not merely authorize a secular program of instruction such as this Court held in Schempp was constitutionally permissible, 374 U.S. at 225:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such a study of the Bible or religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Instead, the Guidelines expressly authorize the "observance" of the religious aspect of religious holidays, an inherently religious action. The Court of Appeals condoned this authorization because the District elsewhere disclaimed an intent to promote religion.[13/] But violations of the Constitution cannot

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13/The "disclaimer" referred to by the Court is contained in a Preamble to the Guidelines:

> It is accepted that no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged. Instead, the school district should encourage all students and staff members to appreciate and be tolerant of each other's religious views. The school district should utilize its opportunity to foster understanding and mutual respect among students and parents, whether it involves race, culture, economic background or religious beliefs. In that spirit of tolerance, students and staff members should be excused from participating in practices which are contrary to their religious beliefs unless there are clear issues of overriding concern that would prevent it.
>
> The Sioux Falls School District recognizes that one of its educational goals is to advance the student's knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization.

be excused by self-serving protestations of good intentions. A statute expressly authorizing prior restraint of political speech would not be saved by a statutory disclaimer of any intent to abridge First Amendment rights.

Moreover, the Guidelines improperly authorize the use of religious means to achieve allegedly secular ends where secular means would suffice McGowan v. Maryland, 366 U.S. 420, 449-52 (1961); Schempp, supra, 374 U.S. at 295 (Brennan, J. concurring).[14/] For example,

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14/Citing McGowan v. Maryland, supra, the Court of Appeals attempted to avoid the significance of Schempp by stressing that the Guidelines permitted observance only of those holidays which have both a religious and secular basis, and it discerned from this 'limitation' a secular purpose of teaching about those aspects of the American cultural heritage which, although "of religious origin, [have] taken on independent meaning." A. 13. But McGowan v. Maryland is wholly irrelevant here because the religious aspects of the holidays have not taken on a wholly independent, secular meaning, as have Sunday Blue Laws.

one of the Christmas plays performed under the Guidelines in 1978,[15] "The Christmas Tree Forest", was a sectarian allegory whose religious message is far more obvious than any conceivable secular message. This play, performed by a second grade class, opens with the following song:

> O come little Children, O come one and all
> Come to the manger in Bethlehem's stall
> And see the Lord Jesus asleep in the hay
> The little Lord Jesus was born on Christmas Day.
> He lies in the manger, the hay is His Bed
> The star high in heaven shines over His Head
> And Mary and Joseph look down on the boy
> While Shepherds and wise men kneel down in their joy.

15/ The Court below refused to pass upon the question of whether the Guidelines were implemented in an unconstitutional manner, ostensibly because the District Court had failed to make findings of fact and because the trial was held before a full holiday season had passed. There is no question,

(footnote cont'd on next page)

At the end of the play, a generous child is rewarded with gifts by "Father Christmas," who explains that gifts are appropriate on Christmas because "That's what the first Christmas really was. The Babe in the manger was a gift to the world, so we really don't have Christmas without giving."

The play has little literary significance independent of its religious message. If it was intended to teach children that they should share with others, or to explain the tradition of giving gifts on Christmas, those points could be made

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15/ (footnote cont'd from previous page)

however, that the holiday programs set forth in the record and briefed by plaintiffs took place, and were considered by School District officials to be authorized by the Guidelines. Accordingly, the Court below erred in not considering this evidence.

without endorsing and promoting the Christian religion as this play (and hence the District) quite obviously does, in violation of the rule in Schempp.

The Guidelines countenance the creation of a religious atmosphere, not only at Christmas but on numerous occasions during the school year. The evidence in this case, dealing as it does with Christmas, illustrates the harm done to this "wall of separation" by the Guidelines. Petitioners do not challenge the singing of Christmas carols per se, or even the performance of religious dramatics in the public schools. They challenge only their use in the public schools as part of holiday "observances."

Religious materials can be studied -- and performed -- in public schools "when presented objectively as part of a secular

program of education." Schempp, supra, 374 U.S. at 225. "Silent Night" can be studied and performed in a music class. Religious materials, like the Bible itself, can be studied in public schools for their "literary and historic qualities." Id. This lawsuit seeks to remove nothing from the public schools except activities constitutionally indistinguishable from those declared in Engel v. Vitale and Schempp to violate the First Amendment's prohibition against religious exercises in the public schools.

B. The Court Below Misapplied the Tripartite Test.

This Court has adopted a tripartite test to identify instances "in which the

objectives of the Religion Clauses have been impaired." Tilton v. Richardson, 403 U.S. 672, 678 (1971). It is hard to imagine practices more violative of the objectives of the Establishment Clause than religious holiday observances in the public schools, where insistence on church-state separation is particularly important. 16/ Epperson v. Arkansas, 393 U.S. at 104-05, citing Shelton v. Tucker, 385 U.S. 489, 603 (1967).

The Guidelines authorize, and the 1978 school Christmas programs in fact contained, religious hymns, religious symbols,

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16/Children, of course, are highly impressionable. Consequently, no arm of government should be more scrupulously neutral in religious matters than the public schools. "This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly." Lemon v. Kurtzman, 403 U.S. 602, 616 (1971).

and religious stories about the birth of a divine son of God. These seasonal activities create a sectarian religious atmosphere and identify the school with the religious group whose holiday is observed. During the 1978 Christmas season, public school students in Sioux Falls learned from the play "The Christmas Tree Forest " that "the Babe in the manger was a gift to the world." They rehearsed the hymn "He Whom Joyous Shepherds Praised." They rehearsed and performed a play, "The Tree That Trimmed Itself," in which characters seek to determine what gifts to bring Jesus on his birthday -- an exercise no less sectarian than the "Beginners Christmas Quiz" performed in a District school during the 1977 Christmas season which both courts below held unconstitutional. A. 23-25. They

sang "Joy to the world, the Lord has come! Let Earth receive her King" and "Come, let us adore Him, Christ the Lord," and were instructed, in a play entitled "Who is the Greatest?", that the Star of the East "guided the Wisemen to the baby Jesus." All of these activities occurred at the same time that churches were celebrating Christmas.

Application of the tripartite test to these activities, as well as to the Guidelines on their face, compels the conclusion that the Guidelines countenance a departure from the "sharp confinement of the public schools to secular education..." Illinois ex rel McCollum v. Bd. of Education, supra, 333 U.S. at 216-17 (Frankfurter, J., concurring).

1. The Guidelines, Construed in Light of the 1978 Programs, Had a Religious Purpose.

In order to pass constitutional muster, a governmental practice involving religion must be motivated by a wholly secular purpose. Although the Preamble to the Guidelines enunciates such a purpose, the evidence shows that the true purpose was, at least in large part, religious, as Judge McMillian suggested in dissent, A. 49-61.

The District's express refusal to limit school holiday "observances" to the secular aspects of holidays sharply highlights the inescapably religious purpose of the decision to authorize schools to observe, at holiday times, the religious basis of those holidays by the singing of

hymns, the display of religious symbols (even when not actively being used for instruction)[17/] and the performance of religious plays. Even assuming arguendo that the District's intent might be in part secular, the Guidelines bespeak a partially religious purpose which requires their invalidation. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 786; see also Schempp, 374 U.S. at 281 (Brennan, J., concurring).

17/The Superintendent of Schools testified that, under the Guidelines, a creche could remain on display for two or three days in a classroom. Tr. 61-62. It is inconceivable that during this entire period, a creche would be used for secular instruction.

2. Effect.

Governmental involvement with religion is unconstitutional if it has the effect of directly advancing or inhibiting religion. The Guidelines undoubtedly have this effect. As Judge McMillian wrote in dissent, A. 61-62:

> Christmas assemblies have a substantial impact, both in favor of one religion and against other religions and non-belief, on the school district employees, the students, the parents and relatives of the students and the community.
>
> When a [school district] so openly promotes the religious meaning of one religion's holidays, the benefit reaped by the religion and the disadvantage suffered by other religions is obvious. Those persons who do not share those holidays are relegated to the status of outsiders by their own government; those persons who do observe those holidays can

> take pleasure in seeing...their belief given official sanction and special status.
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> Fox v. City of Los Angeles, supra, (Bird, C. J., concurring). By sponsoring Christmas assemblies which feature programs of traditional Christmas music, including Christmas carols, only during the Christmas season, the school district has in effect endorsed the beliefs of one religion.

Although the Guidelines purport to treat all religions equally, the Guidelines, as applied, have the effect of reinforcing the beliefs of the majority faith, and both advance and inhibit religion. In 1978, for example, Hannukah (a Jewish holiday with a religious and secular basis according to the Guidelines) fell on the same day as Christmas. Nevertheless, only two of the twenty-one holiday programs conducted that year contained

a song about Hannukah, and none contained Hannukah plays or symbols. By contrast, each of these programs contained Christmas hymns and many of them featured Christmas religious plays such as the "Christmas Tree Forest." 18/

At the same time as these practices inhibit members of the minority faiths by relegating them to the status of outsiders, Fox v. City of Los Angeles, supra; see also

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18/ Observance of Hannukah is no more constitutionally permissible than observance of Christmas. Petitioners do not seek "equal time" for Jewish, Muslim, or any religious holidays. They seek an end to all religious observances in the public schools.

Schempp, supra, 374 U.S. at 290-93 (Brennan, J., concurring); Illinois ex rel McCollum v. Board of Education, 333 U.S. at 227 (Frankfurter, J. concurring), these Christmas programs are perceived by many members of the majority faith as an attempt to reaffirm their religious beliefs.[19/] Three ministers, two of whom had children in the District's schools testified that, for their children, the school's observances were indistinguishable from church services.

19/Such governmental support is not welcomed by all receiving it. For example, William P. Thompson, Stated Clerk, General Assembly, United Presbyterian Church-USA, in a brief amicus filed with the Court below, asserted (p.4) that Christmas assemblies "debase and pervert" the Christian religion. For persons such as Mr. Thompson, these assemblies inhibit, not advance, religion. They are equally invalid under the Establishment Clause. This Court has previously held that a central purpose of the Religion Clauses is to protect religion from such "support". Engel v. Vitale, 390 U.S. at 432.

The Court below, in evaluating the Guidelines, discounted the undoubted religious effect of practices permitted by those Guidelines on the ground that this effect was not "the principal or primary effect" of the policy. A. 21. Implicit in this holding is a recognition of the fact that the Guidelines had some religious effect. Accordingly, the Court below adopted a test expressly rejected by this Court in Committee for Public Education and Religious Liberty v. Nyquist, supra, 413 U.S. at 783 n.39. Nyquist held that any governmental practice which had "the direct and immediate effect of advancing religion" was constitutionally impermissible. Courts should not attempt "metaphysical distinctions" to determine

whether a religious effect is "a" or "the" primary effect. Because the Court below implicitly found that the Guidelines and the 1978 programs had a "direct and immediate effect" of advancing religion, it erred in not invalidating the Guidelines on their face and as applied.

3. Entanglement.

The Court below did not determine whether the Guidelines passed muster under the entanglement branch of the tripartite test because, in its view, entanglement was not relevant to cases involving religion in the public schools. A. 25-26. It reached this conclusion, unsupported by authority, because it found no danger that the Guidelines would permit government to repress religion. This decision misconceives the function of the

Establishment Clause. The Establishment Clause is not a "one way street," Lemon v. Kurtzman, supra, 403 U.S. at 623, designed only to protect religion from government. It is intended as well to protect government from entanglement in continuing religious strife. Id.; Engel v. Vitale, 370 U.S. at 431-32. The entanglement test is expressly designed to protect this aspect of the Establishment Clause by preventing an entanglement which could harm either government or religion.

The decision of the courts reflect this purpose, for they routinely apply this branch of the test to cases involving religious exercises in the public

schools or in other public places. 20/

The danger of political "divisiveness along religious lines", Lemon v. Kurtzman, supra, 403 U.S. at 622, is inherent in the administration of the Guidelines. The Guidelines apply to holidays which by definition contain a mixture of secular and religious elements. The further secularization of these holidays is a matter of intense concern to

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20/E.g., Chess v. Widmar, F.2d , #80-1048 (8th Cir. August 4, 1980); (religious services on college campuses); Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979); Brandon v. Board of Education, 487 F.Supp. 1219 (N.D.N.Y. 1980) appeal pending, #80-7382 (2nd Cir.); Kent v. Ormiston, 402 N.E.2d 1340 (Mass. 1980)(voluntary prayer in the public schools); Johnson v. Huntington, 68 Ca. 3d 1, 137 Cal. Rptr 43, cert. denied, 434 U.S. 897 (1977) (use of public school classroom for prayer by student group) (1978); Lauricella v. Board of Education, 52 A.D. 2d 710, 381 N.Y.S. 566 (4th Dept. 1976).

many religious groups. Respondents' Director of Music testified that he understood the Guidelines to require a balance between religious and secular elements on each program. Tr. 90-91. To achieve this balance, it is necessary for school officials to decide whether a particular song (or play) is religious or secular. There can be no question that many of the songs sung and plays performed at District Christmas assemblies are pervasively religious and that others are purely secular. Nevertheless, there are songs listed for performances at those assemblies whose character is not easily determined. In determining whether a particular song is religious or secular, whether to observe a particular holiday, and how much "observance" each holiday requires, school officials will inevitably

be forced to make sensitive determinations involving religion which are bound to generate on-going government involvement in sectarian controversy; the District Court noted the existence of such controversy in Sioux Falls, A. 86-87.

CONCLUSION

A writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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Dated:
New York, New York
September, 1980

APPENDIX

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 79-1277

ROGER R. FLOREY, on his own behalf and on behalf of his minor son, JUSTIN B. FLOREY; DAVID R. GROETHE; MARILYN DAY; EVELYN GRIESSE; and MARILYN FUSFIELD,

Appellants,

v.

SIOUX FALLS SCHOOL DISTRICT 49-5; RICHARD L. BOHY, President of the Board of Education; DORIS LARSON, DAVID BRANDT, PAM NELSON and JOHN SIMKO, JR., Members of the Board of Education and DR. JOHN W. HARRIS, Superintendent of Schools and their agents, employees, and successors,

Appellees.

Appeal from the United States District Court for the District of South Dakota

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Submitted: September 11, 1979

Files: April 22, 1980

Before HEANEY, ROSS and McMILLIAN, Circuit Judges

HEANEY, Circuit Judge

I.

In response to complaints that public school Christmas assemblies in 1977 and prior years constituted religious exercises, the School Board of Sioux Falls, South Dakota, set up a citizens' committee to study the relationship between church and state as applied to school functions.[1/] The committee's deliberations, which lasted for several months, culminated in the formulation of a policy statement and set of rules outlining the bounds of permissible school activity. After a public hearing, the School Board adopted the policy statement

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[1/] The committee consisted of the school district's director of music, Jewish, Catholic, and Protestant clergy, an attorney, a member of the American Civil Liberties Union, and parents and teachers of students in the district.

and rules recommended by the committee.[2/]

The appellants brought suit for declaratory and injunctive relief, alleging that the policy statement and the rules adopted by the School Board violate the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. The district court reviewed the practices of the Sioux Falls School District and found that the 1977 Christmas program that was the subject of the initial complaints "exceeded the boundaries of what is constitutionally permissible under the Establishment Clause." The court also found, however, that programs similar to the 1977 Christmas program would not be permitted under the new School Board

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[2/] The policy statement and rules are set out in the appendix to this opinion. The rules challenged in this case are those contained under the heading "Observance of Religious Holidays."

guidelines and concluded that the new rules, if properly administered and narrowly construed, would not run afoul of the First Amendment. Florey v. Sioux Falls School District 49-5, 464 F.Supp. 911 (D. S.D. 1979).

The appellants' claim is that the School Board policy and rules are unconstitutional both on their face and as applied. At the time of the district court proceeding, however, no holiday season had passed with the rules in effect. Consequently, little evidence was presented on the actual implementation of the rules, and the district court made no findings in that regard. The record does contain some evidence of the interpretation given the rules by school administrators with respect to the Christmas holiday. We may consider that evidence, as well as the district court's observations on the 1977 Christmas program, in discerning the

meaning of the rules, but because of the absence of district court findings on their application, we limit our review to the constitutionality of the rules on their face.

II.

The close relationship between religion and American history and culture has frequently been recognized by the Supreme Court of the United States.[3/] Nevertheless, the First Amendment to the Constitution explicitly prescribes the relationship between religion and government: "Congress shall make no law respecting an establishment of

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3/ See, e.g., Abington School Dist. v. Schempp, 374 U.S. 203, 212 (1963)("It is true that religion has been closely identified with our history and government."); Engel v. Vitale, 370 U.S. 421, 434 (1962) ("The history of man is inseparable from the history of religion."); Zorach v. Clauson, 343 U.S. 306, 313 (1952)("We are a religious people whose institutions presuppose a Supreme Being.").

of religion, or prohibiting the free exercise thereof * * *."[4/] This apparently straightforward prohibition can rarely be applied to a given situation with ease, however. As the Supreme Court has noted, "total separation [between church and state] is not possible in an absolute sense." Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). As a result, the Court has developed a three-part test for determining when certain governmental activity falls within the constitutional boundaries:

> First, the [activity] must have a secular * * * purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, * * * finally, the [activity] must not foster "an excessive governmental entanglement with religion."

[4/] The First Amendment has been made applicable to the states by the Fourteenth Amendment. Engel v. Vitale, supra at 422; Zorach v. Clauson, supra at 309; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

Id. at 612-613 (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).

A. Purpose

The appellants' contention that the School Board's adoption of the policy and rules was motivated by religious considerations is unsupportable. The record shows that the citizens' committee was formed and the rules drawn up in response to complaints that Christmas observances in some of the schools in the district contained religious exercises. The motivation behind the rules, therefore, was simply to ensure that no religious exercise was a part of officially sanctioned school activities. This conclusion is supported by the opening words of the policy statement: "It is accepted that no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged."

The statement goes on to affirmatively declare the purpose behind the rules:

> The Sioux Falls School District recognizes that one of its educational goals is to advance the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization.

The express language of the rules also leads to the conclusion that they were not promulgated with the intent to serve a religious purpose. Rule 1 limits observation of holidays to those that have both a religious and a secular basis. Solely religious holidays may not be observed. Rule 3 provides that music, art, literature, and drama having religious themes or bases may be included in the school curriculum only if "presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday. Similarly, Rule 4 permits the use of religious symbols only as "a

teaching aid or resource" and only if "such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature." We view the thrust of these rules to be the advancement of the students' knowledge of society's cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry, and drama that is likely to be of interest to the students and their audience.

This purpose is quite different from the express and implied intent of the states of New York, Pennsylvania and Maryland in the Supreme Court "School Prayer Cases." First, we emphasize the different character of the activities involved in those cases. The challenged law in Engel v. Vitale, 370 U.S. 421 (1962), provided for the recitation of a state-authored prayer at the start of each school day. The Supreme Court had no

difficulty characterizing this practice as a religious activity:

> There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious * * *.

Id. at 424-425.

Since prayer, by its very nature, is undeniably a religious exercise, the conclusion is inescapable that the advancement of religious goals was the purpose sought by the school officials in Engel. Indeed, the state officials published the prayer in a document entitled "Statement on Moral and Spiritual Training in the Schools." There can be little doubt that their intent was to promote "spiritual" ends.

Similarly, in Abington School District v. Schempp, 374 U.S. 203 (1963), the Supreme Court emphasized the "pervading

religious character of the ceremony" involving daily Bible reading in the schools. Id. at 224. Again, when a state intentionally sets up a system that by its essential nature serves a religious function, one can only conclude that the advancement of religion is the desired goal. As explained more fully in the next section of this opinion, however, the programs permitted under the Sious Falls rules are not unquestionably religious in nature. Thus, we are not required to infer that the Sioux Falls School Board intended to advance religion.

Moreover, in the Supreme Court prayer cases, compulsory religious exercises were imposed on all schools by state law. The Sioux Falls rules, by contrast, do not require the individual schools to have holiday activities; they merely permit the inclusion of certain programs in the curriculum in the event that classroom teachers

feel that such programs would enhance their overall instructional plan. The rules are an attempt to delineate the scope of permissible activity within the district, not to mandate a statewide program of religious inculcation.

The appellants argue that the "legislative" history of Rule 1 compels the conclusion that the rule was designed to advance religion. The basis for this argument is a proposed amendment to Rule 1 introduced before both the citizens' committee and the School Board. The proposed amendment would have added to Rule 1 the following words: "Such observances shall be limited to secular aspects of these holidays." The amendment was defeated by both the citizens' committee and the School Board. The School Board rejected the proposal, appellants assert in their brief, "because it wanted to allow schools to observe the religious

basis of holidays." This, they maintain, is an unconstitutional purpose.

We do not agree that the rejection of the proposed amendment renders the School Board rules constitutionally infirm. First, the record is devoid of evidence indicating the reasons the proposal was rejected. A number of possibilities suggest themselves, including the ambiguity of the proposed addition. The appellants' assertion that the rejection was due to the School Board's desire "to observe the religious basis of holidays" is thus unsupported. Furthermore, even if the appellants' contention were correct, the Constitution does not necessarily forbid the use of materials that have a "religious basis." Government involvement in an activity of unquestionably religious origin does not contravene the Establishment Clause if its "present purpose and effect" is secular. McGowan v. Maryland, 366 U.S. 420, 445 (1961).

Thus, although the rules permit the schools to observe holidays that have both a secular and a religious basis, we need not conclude that the School Board acted with unconstitutional motives. To the contrary, we agree with the district court's finding that the School Board did not adopt the policy statement and rules for the purpose of advancing or inhibiting religion.

B. Effect

The appellants content that, notwithstanding the actual intent of the School Board, a "principal or primary effect" of the rules is to either advance or inhibit religion. See Lemon v. Kurtzman, supra at 612. We cannot agree. The First Amendment does not forbid all mention of religion in public schools; it is the advancement or inhibition of religion that is prohibited. Committee for Public Education v.

Nyquist, 413 U.S. 756, 788 (1973). Hence, the study of religion is not forbidden "when presented objectively as part of a secular program of education." Abington School District v. Schempp, supra at 225. We view the term "study" to include more than mere classroom instruction; public performance may be a legitimate part of secular study. This does not mean, of course, that religious ceremonies can be performed in the public schools under the guise of "study." It does mean, however, that when the primary purpose served by a given school activity is secular, that activity is not made unconstitutional by the inclusion of some religious content. As the district court noted in its discussion of Rule 3, "[t]o allow students only to study and not to perform [religious art, literature and music when] such works * * * have developed an independent secular and artistic significance would give students a truncated

view of our culture." 464 F.Supp. at 916 (emphasis in original).

The appellants assert, however, that something more than secular study is authorized by the Sioux Falls rules. They point to Rule 1, which states that holidays that have a religious and secular basis may be "observed" in the public schools. "Observation," they maintain, necessarily connotes religious ceremony or exercise and the rule thus has the impermissible effect of advancing religion.

A review of the policy statement and rules as a whole leads us to conclude that the appellants' emphasis of the word "observe" is misplaced and their interpretation of it incorrect. First, as noted in section II.A. of this opinion, the rules must be read together with the policy statement of the School Board. That statement makes it clear that religion is to be neither promoted nor disparaged in the Sioux Falls

schools. Consequently, any ambiguity in the meaning of the word "observed" must be resolved in favor of promoting that policy. Moreover, the only evidence presented on the definition of the word "observed" was the testimony of the School Superintendent, Dr. John Harris. Dr. Harris explained that "observed" means "that programs with content relating to both the secular and religious basis of [the holiday] could be performed, could be presented in the school." (Transcript at 65.) As noted earlier, we view performance or presentation to be a legitimate and important part of "study" in the public schools. Thus, the use of the word "observe" does not mean that the rules have the effect of advancing religion so long as the religious content of the programs is "presented objectively as part of a secular program of education." Abington School District v. Schempp, supra at 225.

To determine whether religion is advanced or inhibited by the rules, then, we must look to see if a genuine "secular program of education" is furthered by the rules. It is unquestioned that public school students may be taught about the customs and cultural heritage of the United States and other countries. This is the principal effect of the rules. They allow the presentation of material that although of religious origin, has taken on an independent meaning.

The district court expressly found that much of the art, literature, and music associated with traditional holidays, particularly Christmas, has "acquired a significance which is no longer confined to the religious sphere of life. It has become integrated into our national culture and heritage."[5/]

[5/] The singing of "Christmas carols" appears to be a primary focal point of appellants'

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objections to the rules. These carols had their origin in England, France, Germany, and other European countries. The first carols written in the United States appeared in the Nineteenth Century, but European carols were sung far earlier. The earliest printed collection of carols was published in 1521. Many of the popular carols of today, including "Adeste Fideles," "Hark the Herald Angles Sing," and "Joy to the World," were written in the early part of the 18th Century. The most popular of all, "Silent Night, Holy Night," was probably composed in Austria in 1818 and first published in 1840. Carols were banned for a period in the New England colonies by the Puritans, but they have been sung in homes, schools, churches, and public and private gathering places during the Christmas season in every section of the United States since that time. Today, carols are sung with regularity on public and commercial television and are played on public address systems in offices, manufacturing plants, and retail stores in every city and village. See T. Coffin, The Book of Christmas Folklore (1973); R. Myers, Celebrations, The Complete Book of American Holidays; 5 Encyclopedia Americana 693 (International ed. 1978).

Many carols have a religious theme; some do not. As in the centuries gone by, some persons object to the singing of carols with a religious basis in any place but the church or home because they feel that to do so debases religion; others have the same objection, but because they feel it enhances religion. We take no part in this argument, it

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Furthermore, the rules guarantee that all material used has secular or cultural significance: Only holidays with both religious and secular basis may be observed; music, art, literature, and drama may be included in the curriculum only if presented in a prudent and objective manner and only as a part of the cultural and religious heritage of the holiday; and religious symbols may be used only as a teaching aid or resource and only if they are displayed as a part of the cultural and religious heritage of the holiday and are temporary in nature. Since all programs and materials authorized by the rules must deal with the secular or cultural basis or heritage of the holidays and

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being entirely clear to us that carols have achieved a cultural significance that justifies their being sung in the public schools of Sioux Falls, South Dakota, if done in accordance with the policy and rules adopted by that school district.

since the materials must be presented in a prudent and objective manner and symbols used as a teaching aid, the advancement of a "secular program of education," and not of religion, is the primary effect of the rules.

The appellants argue that, despite the secular benefits, inclusion of material with a religious theme, basis, or heritage invalidates the rules. In support of this assertion, the appellants point out that several of appellants' witnesses, all of them ordained clergymen, testified that the singing of Christmas carols would have some religious effect on them. But the appellants misread the test laid down by the Supreme Court. As noted, Lemon v. Kurtzman, supra, permits a given activity if "its principal or primary effect [is] one that neither advances nor inhibits religion." 403 U.S. at 613 (emphasis added). It would be literally impossible

to develop a public school curriculum that did not in some way affect the religious or non-religious sensibilities of some of the students or their parents. School administrators should, of course, be sensitive to the religious beliefs or disbeliefs of their constituents and should attempt to avoid conflict,[6] but they need not and should not

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[6] In keeping with the goal of avoiding conflict with students' religious beliefs, the Sioux Falls policy statement includes the following:

> The school district should utilize its opportunity to foster understanding and mutual respect among students and parents, whether it involves race, culture, economic background or religious beliefs. In that spirit of tolerance, students and staff members should be excused from participating in practices which are contrary to their religious beliefs unless there are clear issues of overriding concern that would prevent it.

The school district may, of course, excuse students from participating in this or any other school activity. But excusing students from participation does not solve Establishment Clause problems, Abington School District

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sacrifice the quality of the students' education. They need only ensure that the primary effect of the school's policy is secular. The district court's finding that they have done this by the challenged rules is not clearly erroneous.

The distinction between an activity that primarily advances religion and one that falls within permissible constitutional limits may be illustrated by comparing the 1977 kindergarten Christmas program found by the district court to be an impermissible religious activity and the programs authorized by the new School Board guidelines. The 1977 program at one of the elementary schools contained a segment that, in the words of the district

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v. Schempp, supra at 224-225, and we find this aspect of the school district rules to be irrelevant to our Establishment Clause analysis.

court, "was replete with religious content including a responsive discourse between the teacher and the class entitled, 'The Beginner's Christmas Quiz.'" The "Quiz" read as follows:

> Teacher: Of whom did heav'nly angels sing,
>
> And news about His birthday bring?
>
> Class: Jesus.
>
> Teacher: Now, can you name the little town
>
> Where they the Baby Jesus found?
>
> Class: Bethlehem.
>
> Teacher: Where had they made a little bed
>
> For Christ, the blessed Savior's head?
>
> Class: In a manger in a cattle stall.
>
> Teacher: What is the day we celebrate
>
> As birthday of this One so great?
>
> Class: Christmas.

This "Quiz" and other similar activities constituted, the district court found, "a predominantly religious activity" which exceeded constitutional bounds. We agree with this characterization and with the district court's observation that similar programs would be prohibited by the new rules. The administration of religious training is properly in the domain of the family and church. The First Amendment prohibits public schools from serving that function.

C. Entanglement

The appellants contend that the new guidelines in Sioux Falls unconstitutionally "foster an excessive government entanglement with religion." See Lemon v. Kurtzman, supra at 613. All the Supreme Court cases cited by the appellants in support of the "entanglement" test deal with governmental aid to sectarian institutions, not with the permissible

scope of activity in the public schools. In a "parochaid" case, the court is presented with a situation in which the state is involving itself with a concededly religious activity or institution. The real danger is the potential for state repression of such institutions. In the present case, by contrast, the school district is called upon to determine whether a given activity is religious. This type of decision inheres in every curriculum choice and would be faced by school administrators and teachers even if the rules did not exist. Indeed, the rules are guidelines designed to aid in the decision-making process. Rather than entangling the schools in religion, the rules provide the means to ensure that the district steers clear of religious exercises. We think the district court was correct in finding that the new rules do not unconstitutionally entangle the Sioux Falls school district in religion or religious institutions.

III.

The appellants also contend that implementation of the policy and rules of the Sioux Falls School Board should be enjoined because the rules violate the Free Exercise Clause of the First Amendment. This contention does not withstand scrutiny.[7/]

The public schools are not required to delete from the curriculum all materials that may offend any religious sensibility. As Mr. Justice Jackson noted in McCollum v. Board of Education, 333 U.S. 203, 235 (1948):

> Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them * * * has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their

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[7/] The free exercise issue is stressed by amicus curiae, but it seems to have been added to the appellants' appeal brief as an afterthought. Neither the complaint, the trial briefs, nor the district court opinion mention the Free Exercise Clause; all are concerned only with the Establishment Clause.

> teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.

These inevitable conflicts with the individual beliefs of some students or their parents, in the absence of an Establishment Clause violation, do not necessarily require the prohibition of a school activity. On the other hand, forcing any person to participate in an activity that offends his religious or non-religious beliefs will generally contravene the Free Exercise Clause, even without an Establishment Clause violation. See Wisconsin v. Yoder, 406 U.S. 205 (1972). In this case, however, the Sioux Falls School Board recognized that problem and expressly provided that students may be excused from activities authorized by the rules if they so choose.[8/]

[8/] See note 6 supra.

IV.

We recognize that this opinion affirming the district court will not resolve for all times, places, or circumstances the question of when Christmas carols, or other music or drama having religious themes, can be sung or performed by students in elementary and secondary public schools without offending the First Amendment. The constitutionality of any particular school activity conducted pursuant to the rules, in association with any particular holiday, cannot be determined unless and until there is a specific challenge, supported by evidence, to the school district's implementation of the rules. We simply hold, on the basis of the record before us, that the policy and rules adopted by the Sioux Falls Board of Education, when read in the light of the district court's holding that segments of the 1977 Christmas

program at one of the elementary schools were impermissible, are not violative of the First Amendment.[9/]

For the foregoing reasons, the judgment of the district court is affirmed.

9/ For a contrary view, see Note, Religious--Holiday Observances in the Public Schools, 48 N.Y.U.L. Rev. 1116 (1973). The authors of that Note would permit programs relating to religious holidays but would prohibit the display of any religious art or symbols as a part of the program and would further prohibit the singing of carols or songs that express reverence to God, Jesus, Buddha, Mohammed, or any other religious prophet or leader.

APPENDIX

I. POLICY

Recognition of Religious Beliefs and Customs

It is accepted that no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged. Instead, the school district should encourage all students and staff members to appreciate and be tolerant of each other's religious views. The school district should utilize its opportunity to foster understanding and mutual respect among students and parents, whether it involves race, culture, economic background, or religious beliefs. In that spirit of tolerance, students and staff members should be excused from participating in practices which are contrary to their religious beliefs unless

there are clear issues of overriding concern that would prevent it.

The Sioux Falls School District recognizes that one of its educational goals is to advance the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural, and historical development of civilization.

II. RULES

Observance of Religious Holidays

The practice of the Sioux Falls School District shall be as follows:

1. The several holidays throughout the year which have a religious and a secular basis may be observed in the public schools.

2. The historical and contemporary values and the origin of religious holidays may be explained in an unbiased and objective manner without sectarian indoctrination.

3. Music, art, literature, and drama having religious themes or basis are permitted as part of the curriculum for school-sponsored activities and programs if presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday.

4. The use of religious symbols such as a cross, menorah, crescent, Star of David, creche, symbols of Native American religions, or other symbols that are a part of a religious holiday, is permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature. Among these holidays are included Christmas, Easter, Passover, Hannukah, St. Valentine's Day, St. Patrick's Day, Thanksgiving, and Halloween.

5. The school district's calendar should be prepared so as to minimize conflicts with religious holidays of all faiths.

Religion in the Curriculum

Religious institutions and orientations are central to human experience, past and present. An education excluding such a significant aspect would be incomplete. It is

essential that the teaching about--and not of--religion be conducted in a factual, objective, and respectful manner.

Therefore, the practice of the Sioux Falls School District shall be as follows:

1. The District supports the inclusion of religious literature, music, drama, and the arts in the curriculum and in school activities provided it is intrinsic to the learning experience in the various fields of study and is presented objectively.

2. The emphasis on religious themes in the arts, literature, and history should be only as extensive as necessary for a balanced and comprehensive study of these areas. Such studies should never foster any particular religious tenets or demean any religious beliefs.

3. Student-initiated expressions to questions or assignments which reflect their beliefs or non-beliefs about a religious theme shall be accommodated. For example, students are free to express religious belief or non-belief in compositions, art forms, music, speech, and debate.

Dedications and Commencement

Traditions are a cherished part of the community life, and the Sioux Falls School District expresses an interest in maintaining those traditions which have had a significance to the community. Such ceremonies should recognize the religious pluralism of the community.

Therefore, the practice of the Sioux Falls School District shall be as follows:

1. A dedication ceremony should recognize the religious pluralism of the community and be appropriate to those who use the facility. An open invitation should be extended to all citizens to participate in the ceremony.

2. Traditions, i.e., invocation and benediction, inherent in commencement ceremonies, should be honored in the spirit of accommodation and good taste.

3. Because the baccalaureate service is traditionally religious in nature, it should be sponsored by agencies separate from the Sioux Falls School District.

McMillian, Circuit Judge, dissenting

I dissent. Before discussing the three-part Establishment Clause test and applying its analysis to this case, I would note that this case involves a close question in one of the most sensitive areas of constitutional law, the relationship between religion and public education.[1] The Supreme Court's

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[1] "The Court's historic duty to expound the meaning of the Constitution has encountered few issues more intricate or more demanding than that of the relationship between religion and the public schools. Since undoubtedly we are 'a religious people whose institutions presuppose a Supreme Being,' Zorach v. Clauson, 343 U.S. 306, 313, deep feelings are aroused when aspects of that relationship are claimed to violate the injunction of the First Amendment that government may make 'no law respecting an establishment of religion, or prohibiting the free exercise thereof....' Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom."

(footnote cite on following page)

Establishment Clause cases have developed "controlling constitutional standards [which] have become firmly rooted and the broad contours...are now well defined," Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 761 (1973)(Nyquist), but those standards are not easily applied and the precedents do not squarely address this case. This is not a financial aid case; rather, this is a variation of the school prayer (Engel v. Vitale, 370 U.S. 421 (1962)) and Bible reading (School District v. Schempp, 374 U.S. 203 (1963)(Schempp)) cases. Preparing and presenting Christmas assemblies is not a religious activity in the obvious sense that reciting a non-denominational prayer or reading from the Bible are religious activities.

(footnote cite from preceding page)

School District v. Schempp, 374 U.S. 203, 230 (1963)(Brennan, J., concurring)(Schempp).

Prayer is "a solemn avowal of divine faith and supplication for the blessings of the Almighty." Engel v. Vitale, supra, 370 U.S. at 424. Similarly, reading from the Bible is a religious exercise.[2/] Schempp, supra, 374 U.S. at 224. When compared with school prayers or Bible reading, Christmas assemblies, and in particular the singing of Christmas carols, appear ambiguous in character. Nonetheless, I am of the opinion that the preparation and presentation of

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[2/] "Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the state's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting non-attendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for non-religious moral inspiration or as a reference for the teaching of secular subjects."

Schempp, supra, 374 U.S. at 224.

Christmas assemblies in the public schools violates the Establishment Clause.

"The problem, like many problems in constitutional law, is one of degree." Zorach v. Clauson, 343 U.S. 306, 314 (1952). I quite agree with the majority that singing Christmas carols in the public schools is not necessarily a violation of the Establishment Clause. Slip op. at 9. "[N]ot every involvement of religion in public life is unconstitutional...." Schempp, supra, 374 U.S. at 232 (Brennan, J., concurring). As noted by the majority, the Christmas carol is a music form which is undoubtedly worthy of study. Slip op. at 11 n.5. Nothing in my analysis should be taken to mean that the study of Christmas carols and other Christmas traditions, "when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." Schempp, supra,

374 U.S. at 225. "Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view." Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 236 (1948)(Jackson, J., concurring)(McCollum). Similarly, western European history would be incomplete without the Crusades, the Inquisition, or the Reformation, as would early American history (and the history of the Establishment Clause itself, see Nyquist, supra, 413 U.S. at 770 n.28) without the Puritans, the Quakers or the Transcendentalists. To return to the metaphor of music, nothing in my analysis would limit a music curriculum to fugues and minuets, see Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)(Lemon), and exclude oratorios.

I. Three-Part Test

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion...." U.S. Const. Amend I. Although phrased in absolute terms, the Establishment Clause has never been held to require "total separation" of church and state in an absolute sense. Lemon, supra, 403 U.S. at 614; cf. McDaniel v. Paty, 435 U.S. 618 (1978)(state statute barring the clergy from public office held unconstitutional). However, the Establishment Clause definitely has "a secular reach far more penetrating in the conduct of government than merely to forbid an 'established church.'" McCollum, supra, 333 U.S. at 213 (Frankfurter, J., concurring).[3/] The line of separation is

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3/ "Its authors did not simply prohibit the establishment of a state church or a state

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certainly neither straight nor easily determined. See Committee for Public Education and Religious Liberty v. Regan, 48 U.S.L.W. 4168, 4173 (U.S. Feb. 20, 1980)(Blackmun, J., dissenting)(Regan)("the wavering line" separating church and state). As described in Lemon, supra, 403 U.S. at 614, "the line of separation, far from being a [high and impregnable] 'wall,' is a blurred, indistinct,

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religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be 'no law respecting an establishment of religion.' A law may be one 'respecting' the forbidden objective while falling short of its total realization. A law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."

Lemon, supra, 403 U.S. at 612 (emphasis in original.

and variable barrier depending on all the circumstances of a particular relationship." Although in my view the line of separation has become unnecessarily blurred,

> [t]he fact is that the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion.

Schempp, supra, 374 U.S. at 231 (Brennan, J., concurring). Further, "[n]either [a state nor the federal government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." Torcaso v. Watkins, 367 U.S. 488, 495 (1961)(citations and footnotes omitted).

"By reason of the First Amendment, government is commanded 'to have no interest in theology or ritual,' for on those matters 'government must be neutral.'" Engel v. Vitale, supra, 370 U.S. at 443 (Douglas, J., concurring), citing McGowan v. Maryland, 366 U.S. 420, 563 (1961)(Doublas, J., dissenting).

The focus of an Establishment Clause analysis is whether the challenged action involves "the three main concerns against which the Establishment Clause sought to protect: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Tilton v. Richardson, 403 U.S. 672, 677 (1971), citing Walz v. Tax Commissioner, 397 U.S. 664, 668 (1970).

> The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from [the Supreme] Court's decisions. In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither

> advances nor inhibits religion, and must not foster an excessive government entanglement with religion.

Wolman v. Walter, 433 U.S. 229, 235-36 (1977), citing Roemer v. Maryland Public Works Board, 426 U.S. 736, 748 (1976); Nyquist, supra, 413 U.S. at 772-73; Lemon, supra, 403 U.S. at 612-13. The three-part test "has been clearly stated, if not easily applied." Meek v. Pittenger, 421 U.S. 349, 358 (1975). In recent Supreme Court cases, it has been applied to "those [cases] involving public aid in varying forms to sectarian educational institutions," the second of the two general categories of religion and education cases raising Establishment Clause questions identified by Mr. Justice Powell in Nyquist, supra, 413 U.S. at 772 (footnote omitted). At issue here is the first category: "those [cases] dealing with religious activities within the public schools." Id. (footnote omitted); cf. Lanner v. Wimmer, 463 F.Supp. 867, 881

(D. Utah 1978)(accreditation of Bible history classes by public school held to violate Establishment Clause). The action challenged here is necessarily less substantive than the kind of action at issue in the financial aid cases, but the tests of secular legislative purpose, impermissible effect, and excessive entanglement are equally applicable. "[T]hese tests or criteria should be 'viewed as guidelines' within which to consider 'the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause.'" Id. at 773 n.31, citing Tilton v. Richardson, supra, 403 U.S. 677-78; see also Meek v. Pittenger, supra, 421 U.S. at 358-59.

As noted by the majority, there was little evidence presented below about the actual implementation of the school district's policy and rules for the observance of religious

holidays. Slip op. at 3. At the center of the controversy in the present case is the Christmas assembly. At oral argument, counsel for the school district and for appellants supplied a few additional details about the Christmas assemblies. The other holiday observances were not discussed. The contents of the Christmas holiday observances varies from teacher to teacher; the complexity of the material depends upon the grade level; the lower grades tend to have class parties while the upper grades tend to have school assemblies; the assemblies are typically concerts which feature traditional Christmas music and songs, including Christmas carols such as "Silent Night" and "Come All Ye Faithful"; the assemblies are usually held during the evening at the particular school; assembly attendance is not compulsory and students could excuse themselves; assembly activity is not graded but assembly

preparation is part of the general classroom work and may involve as much as two months of the school year (this time is, of course, not devoted entirely to assembly preparation). This kind of Christmas assembly is a traditional feature in many public schools and in many communities across the country. However, widespread observance or "mere longevity of custom does not in itself insulate a practice from constitutional scrutiny." Fox v. City of Los Angeles, 22 Cal. App. 2d 792, 587 P.2d 663, 671, 150 Cal. Rptr. 867 (1978)(banc) (Bird, C.J., concurring)(cross displayed in city hall windows at Easter enjoined as violation of Establishment Clause in state constitution), citing 139 Cal. Rptr. 180, 184 (App. 1977). "[H]istorical acceptance without more [does] not alone [suffice], as 'no one acquires a vested or protected right in violation of the Constitution by long use.'" Nyquist, supra, 413 U.S. at 792, citing Walz v. Tax Commissioner, supra, 397 U.S. at 678.

II. The Secular Legislative Purpose Test

First, I am not totally persuaded that the policy and rules reflect a clearly secular legislative purpose. It cannot be overlooked that complaints about the religious content of several Christmas assemblies prompted the formation of the citizens' advisory committee and the adoption of the policy and rules by the school board. Against this background I am inclined to view the school board's rejection of the proposed "secular aspects only" amendment as indicative of a purpose to permit more than the study (including performance when appropriate) of religion, subjects with religious content or significance and religious traditions. Cf. Maltzer v. Board of Education, 577 F.2d 311, 317 (5th Cir. 1978)(banc)(Brown, D.J., dissenting in part)(majority upheld guidelines for distribution of religious literature in public schools against Establishment

Clause attack), cert. denied, 439 U.S. 1089 (1979). In addition, the rules refer exclusively to "religious holidays." No doubt this singular orientation reflects the nonexistence of agnostic or atheistic occasions. The rules do not address the observance of non-religious holidays, such as Veterans Day, Arbor Day, Memorial Day, Labor Day, the birthdays of various presidents or civic leaders (i.e. the controversy over whether Martin Luther King's birthday should be a holiday). To the extent the policy and rules focus only on religious holidays, I would find the policy and rules unconstitionally operate as a preference of religion.

Like the majority, I too accept "the thrust of these rules to be the advancement of the students' knowledge of society's cultural and religious heritage." Slip op. at

5-6. The opening words of the policy statement takes the commendable position that "no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged." Slip op. at 18 (Appendix). I do not deny that knowledge of society's cultural and religious heritage and the encouragement of tolerance (religious and other kinds) and mutual understanding are admirable secular goals. However, I find several problems in the relationship between the rules and these secular goals. First, I do not understand how the observance of religious holidays promotes these secular goals. Moreover, I do not understand how the observance of particular religious holidays (i.e. Christian and Jewish holidays; but see note 4 infra), but not others (i.e., Ramadan, North American Indian holidays, Hindu holidays) encourages student knowledge and appreciation of religious and

cultural diversity. For example, the observance of the holidays of religions less familiar to most American public school children then either Christian or Jewish holidays would seem more likely to increase student knowledge and promote religious tolerance.

Second, even assuming the observance of religious holidays does advance these secular goals, those secular goals can be achieved in public education without the "observance" of religious holidays. As Mr. Justice Brennan observed in Schempp,

> Torcaso and the Sunday Law Cases forbid the use of religious means to achieve secular ends where nonreligious means will suffice....While I do not question the judgment of experienced educators that the challenged practices [Bible reading] may well achieve valuable secular ends [fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline], it seems to me that the state acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice.

374 U.S. at 281. Here the school district seeks to accomplish secular goals by religious means, the observance of religious holidays. Surely the school district can advance student knowledge and tolerance of religious diversity as effectively by non-religious means, that is, through the study of comparative religions or as part of the history or social studies curriculum. In any case, the observance of religious holidays as a means of accomplishing the secular goals of knowledge and tolerance clearly discriminates against non-belief.

Third, even if the secular goals of student knowledge and religious tolerance are promoted by religious means and non-religious means are inadequate, why should the rules limit such observance only to those holidays which have "a religious and a secular basis"? Why require these holidays to have a secular basis at all? Ostensibly it

is the religious basis of these particular holidays (and the different religions thus represented) which is critical to the promotion of student knowledge and tolerance of religious diversity. In this context, a particular holiday's secular basis is irrelevant. Nonetheless, the inclusion of a secular basis requirement does balance and diffuse the religious basis requirement and thereby appears, at first glance, to shield the rules from constitutional attack.

Finally, the rules state that several holidays have "a religious and a secular basis" but fail to explain what is meant by those terms. The rules identify such holidays as Christmas, Easter, Passover, Chanukah, Valentine's Day, St. Patrick's Day, Thanksgiving, and Halloween. On the one hand, I find it very difficult to articulate exactly what is meant by "secular basis" and to discern the secular basis of some of

some of the holidays (i.e. Easter). Secular basis presumably refers to something other than religiously neutral symbols (i.e. snowmen and jingle bells instead of Nativity scenes and the Star of Bethlehem), association with majoritarian (Christian) cultural traditions, commercialization, or observance contemporaneous with Christian religious holidays.4/

On the other hand, I find it equally difficult to ascertain what is meant by "religious basis," particularly as applied to holidays like Valentine's Day. Valentine's Day does have a certain degree of

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4/ For example, Passover is often paired with Easter as is Chanukah with Christmas; however, Chanukah is not a major Jewish holiday and the rules, to the extent they suggest Chanukah has a religious significance to Jews comparable to that of Christmas to Christians, distort Judaism. Brief of American Jewish Congress as amicus curiae at 2 n.2. The rules do not include Rosh Hashanah or Yom Kippur.

secular (and commercial) significance as an occasion for the exchange of expressions of love and affection. However, the religious origin of Valentine's Day can only be characterized as remote (it is the name day of a Roman Christian martyr of the second century AD) and its contemporary religious significance minimal. The same observation is more or less true of St. Patrick's Day and Halloween, particularly insofar as those holidays are "celebrated" today. Furthermore, the "religious basis" of the holidays listed in the rules varies rather markedly, for example, from Valentine's Day to Easter. In fact, Thanksgiving arguably seems to me the one holiday listed in the rules which has both a discernible secular and religious basis; Thanksgiving commemorates an event of some significance (perhaps apocryphal) in early American colonial history and is a national holiday set aside for giving

thanks to God. Thanksgiving is a federal legal public holiday. See 5 U.S.C. § 6103 (a).

Christmas is especially difficult. Despite its many and diverse secular manifestations, Christmas remains an event of immense and undiminished significance to Christians: the celebration of the birth of Christ. Cf. McGowan v. Maryland, supra, 366 U.S. at 431-53 (Sunday closing laws upheld as establishing uniform day-of-rest and recreation with only remote or incidental religious benefit). Unlike Thanksgiving, Christmas had no inherent secular basis as the anniversary of an American historical event. Christmas has nonetheless acquired an undeniable secular importance and general acceptance as a holiday season over the years. As noted in Allen v. Morton, 161 U.S. App. D.C. 239, 495 F.2d 65 (1973), which involved an Establishment Clause

challenge to the annual "Christmas Pageant of Peace" celebrated on federal parkland adjacent to the White House that included the display of a life-size Nativity scene or "creche," Christmas holiday observances are often associated with the laudable secular theme of expressing a national desire for "Peace on Earth, Goodwill Toward Men," Id. at 69. Christmas is also a federal legal public holiday, 5 U.S.C. § 6103(a), and is observed directly and indirectly in many government activities: for example, the President lights a national Christmas tree, the post office issues commemorative stamps for the Christmas season which feature artwork with Christian themes, local governments display Christmas trees and Christmas decorations on public buildings, city streets and city squares.

Nonetheless, what is constitutionally unobjectionable for adults or in a non-public school context, but see Fox v. City of

Los Angeles, supra, 587 P.2d at 666, may be prohibited for public school children. See, e.g., Tilton v. Richardson, supra, 403 U.S. at 685 (Burger, C.J.)(distinction between elementary and secondary education and university education); Schempp, supra, 374 U.S. at 294-300 (Brennan, J., concurring)("Of special significance to this distinction is the fact that we are here usually dealing with adults, not with impressionable children as in the public schools."). To the extent the school district seeks to justify the observance of the Christmas holiday as an occasion to advance the students' knowledge of cultural and religious knowledge, diversity, and tolerance or to promote peace among mankind,[5/] these objectives could be

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5/ Likewise, in Schempp the school authorities argued that Bible reading and other religious recitations in public

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accomplished by the observance of a more neutral "holiday," for example United Nations Day. "Such substitutes would, I think, be unsatisfactory or inadequate only to the

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> schools served, primarily, secular purposes, including "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." 314 U.S. at 223....
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> It may assist in providing a historical perspective to recall that the argument here is not a new one. The Preamble to Patrick Henry's Bill Establishing a Provision for Teachers of the Christian Religion, which would have required Virginians to pay taxes to support religious teachers and which became the focal point of Madison's Memorial and Remonstrance..., contained the following listing of secular purposes: "The general diffusion of Christian knowledge that a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society...."

Nyquist, supra, 413 U.S. at 784-85 n.39, citing Everson v. Board of Education, 330 U.S. 1, 72-74 (1947) (Appendix to dissent of Rutledge, J., reprinting the Bill in full).

extent that the present activities do in fact serve religious goals." Schempp, supra, 374 U.S. at 281 (Brennan, J., concurring).

Even assuming the school board acting with a secular legislative purpose, "the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State." Nyquist, supra, 413 U.S. at 774.

III. The Primary Effect Test

Second, do the rules, particularly to the extent they permit the preparation and presentation of Christmas assemblies, have a principal or primary effect which either advances or inhibits religion? Unlike the majority, I think they do. Christmas assemblies have a substantial impact, both in favor of one religion and against other

religions and non-belief, on the school district employees, the students, the parents and relatives of the students and the community.

> When a [school district] so openly promotes the religious meaning of one religion's holidays, the benefit reaped by that religion and the disadvantage suffered by other religions is obvious. Those persons who do not share those holidays are relegated to the status of outsiders by their own government; those persons who do observe those holidays can take pleasure in seeing ...their belief given official sanction and special status.

Fox v. City of Los Angeles, supra, 587 P.2d at 670 (Bird., C.J., concurring). By sponsoring Christmas assemblies which feature programs of traditional Christmas music, including Christmas carols, only during the Christmas season, the school district has in effect endorsed the beliefs of one religion. See Engel v. Vitale, supra, 370 U.S. at 430-31. The school district devotes considerable faculty time to the preparation

and presentation of these assemblies; students expend considerable classroom time to the same end.

"The unconstitutionality of this practice crystallizes when we consider what is being displayed where and when." Fox v. City of Los Angeles, supra, 587 P.2d at 670 (Bird, C.J., concurring)(emphasis in original). Viewed in context, I do not think Christmas assemblies can accurately be described as merely arts festivals or choral concerts. These assemblies contain material that is unmistakably Christmas-oriented and are held only during the Christmas season, not in October or April. The programs of Christmas assemblies may include songs, poems or dramatic presentations, all of which may have artistic merit, but the subject and particularly the timing of these assemblies are no less revealing than the term "Christmas assembly." In contrast,

Christmas carols presented as a music form could be performed at any time during the school year, not just at Christmas. Even though generally performed during the evening (when the school buildings are not being used educationally), assembly preparations are conducted in public school buildings, during the school day, by public school teachers.

It is not enough that the challenged action has a principal or primary effect that neither advances nor inhibits religion. Compare Lemon, supra, 403 U.S. at 612, with Nyquist, supra, 413 U.S. at 783-84 & n.39. The majority identifies the principal effect of the rules to be education about the customs and cultural heritage of the United States and other countries. Even accepting this characterization (I would emphasize instead the musical or dramatic impact of the Christmas assemblies) of the principal

secular effect, this principal secular effect is not separable from the religious effect. Moreover, the religious effect is not "remote, indirect or incidental" to the secular effect. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW 840 (1978). In Nyquist, the Supreme Court cautioned against using the principal or primary effect test to make "metaphysical" distinctions between primary and secondary effects. 413 U.S. at 783-84 n.39. The Supreme Court stated that "[o]ur cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." Id. In other words, the primary effect test forbids any government action that has a substantial religious impact. See Meltzer v. Board of Education,

supra, 577 F.2d at 318 (Brown, D.J., dissenting in part)(outlines a non-discriminatory impact principle), citing Gillette v. United States, 401 U.S. 437, 450 (1971); Allen v. Morton, supra, 495 F.2d at 87 (Leventhal, J., concurring); Fox v. City of Los Angeles, supra, 587 P.2d at 673 & n.11 (Bird, C.J., concurring). As discussed above, I would find that Christmas assemblies do have a substantial religious (or non-secular) effect, an effect which cannot be "offset" by a primary secular effect under the formulation of the primary effect test set forth in Nyquist. I do not dispute that Christmas assemblies have secular effects (cultural education, promotion of religious diversity, musical and dramatic value); however, "[s]uch secular objectives, no matter how desirable and irrespective of whether judges might possess sufficiently sensitive calipers to ascertain whether the secular

effects outweigh the sectarian benefits, cannot serve today any more than they could 200 years ago to justify such a direct and substantial advancement of religion." 413 U.S. at 785 n.39.

IV. The Excessive Entanglement Test

Third, I think the rules necessarily foster an excessive entanglement of the school district with religion. As noted by the majority, the rules call upon the school district to determine whether a given activity is religious. Slip op. at 15.

> The [school board] may also find itself effectively defining religion or censoring the content of religious materials ....[T]he secular public school system could become the focal point for the competition of all religious beliefs [and non-belief]. The courts and other state officials would be under a continuing duty to make certain that one faith was not in effect being endorsed and promoted by [the observance of religious holidays]. Indeed, it is ironic that the more fairly and objectively the guidelines are enforced, the more the school board will become immersed in serious religious judgments.

Meltzer v. Board of Education, supra, 577 F.2d at 319 (Brown, C.J., dissenting in part). "A comprehensive, discriminating and continuing state surveillance will inevitably be required to ensure that [the rules] are obeyed and the First Amendment respected." Lemon, supra, 403 U.S. at 619. Of course, it is precisely this type of "excessive and enduring entanglement between state and church," id., which is proscribed by the Establishment Clause.

> [T]he Establishment Clause embodied the Framers' conclusion that government and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other. It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government. It has rightly been said of the history of the Establishment Clause that "our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism... of a Roger Williams."

Schempp, supra, 374 U.S. at 259-60 (Brennan, J., concurring)(footnotes omitted), citing P. FREUND, THE SUPREME COURT OF THE UNITED STATES 84 (1964).

In addition to administrative entanglement, the rules also enmesh the school district in another type of entanglement first articulated in Lemon, supra, 403 U.S. at 623, that is, "the potential for political divisiveness related to religious belief and practice." See also Meek v. Pittenger, supra, 421 U.S. at 372; Nyquist, supra, 413 U.S. at 797-98; see generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW 866 (1978). As in the case of financial aid to parochial schools, proponents in favor of religious holiday observances, opponents against religious holiday observances and advocates for specific religious (or non-religious) holidays will engage in considerable political activity either to elect school board members

whose views are compatible with their own views or to influence the school board.

> It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.
>
> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.

Lemon, supra, 403 U.S. at 622 (citations omitted).

V. The Free Exercise Challenge

Appellants also argue that the rules on the observance of religious holidays violate the Free Exercise Clause. In view of my Establishment Clause analysis, I do not reach this issue. However, I do not agree with the majority that the availability of excusal from participation in activities authorized

under the rules refutes the Free Exercise challenge. Slip op. at 17.

> [T]he excusal procedure itself necessarily operates in such a way as to infringe the rights of free exercise of those children who wish to be excused. [The Supreme Court] held in Barnette and Torcaso, respectively, that a state may require neither public school students nor candidates for an office of public trust to profess beliefs offensive to religious principles. By the same token the state could not constitutionally require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention....[B]y requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. Thus the excusal provision in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.

Schempp, supra, 374 U.S. at 288-90 (Brennan, J., concurring)(citations and footnotes omitted).

VI. Conclusion

Of course, "every vestige, however slight, of cooperation or accommodation between religion and government" is not unconstitutional.[6/] Id. at 294; cf. Sherbert v. Verner, 374 U.S. 398 (1963)(free exercise clause required accomodation of state unemployment compensation benefits program for member of Seventh Day Adventist Church); Zorach v. Clauson, supra, 343 U.S. at 312 (released time for

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6/ For example, chaplains are provided in the armed forces and in prisons; public meetings (see Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979)) and legislative sessions are frequently opened by prayers; legislatures are served by chaplains; judicial sessions are opened with references to God; the currency of the United States carries the motto "In God We Trust"; businesses are closed by Sunday closing laws. See Schempp, supra, 374 U.S. at 296-304 (Brennan, J., concurring); Engel v. Vitale, supra, 370 U.S. at 435 n.21; but cf. id. at 437-41 n.n. 1-6 (Douglas, J., concurring) ("Our system at the federal and state levels is presently honeycombed with [government financing of religious exercise].").

religious instruction off school premises). There is nothing unconstitutional about the use of religious subjects or materials in public schools as long as it is presented as part of a secular program of education. However, to the extent the policy and rules adopted by the Sioux Falls School District authorizes the observance of religious holidays, particularly Christmas assemblies, in a manner other than as part of a secular program of education, I would hold the policy and rules violate the Establishment Clause.

The above analysis may be regarded by some as hypersensitive or even antireligious. It is not. Judicial scrutiny of the relationship between religion and government must be particularly scrupulous in the context of the public school.

> The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of

> religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the state undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

McCollum, supra, 333 U.S. at 216-17 (Frankfurter, J., concurring).

> It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort--an atmosphere in which children may assimilate a heritage common to

> all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic.

Schempp, supra, 374 U.S. at 241-42 (Brennan, J., concurring)(citations omitted)(emphasis in original)(speaking in terms of division along religious lines).

I would reverse the judgment of the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS

EIGHTH CIRCUIT.

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

February 13, 1979

Mr. Stephen L. Pevar
American Civil Liberties Union
1741 High Street
Denver, Colorado 80218

Mr. Deming Smith
Davenport, Evans,
Hurwitz & Smith
National Reserve Building
Sioux Falls, South Dakota 57102

RE: ROGER R. FLOREY, on his own behalf and on behalf of his minor son, JUSTIN B. FLOREY; DAVID R. GROETHE; MARILYN DAY; EVELYN GRIESSE; and MARILYN FUSFIELD vs. SIOUX FALLS SCHOOL DISTRICT 49-5; RICHARD L. BOHY, President of the Board of Education; DORIS LARSON, DAVID BRANDT, PAM NELSON, and JOHN SIMKO, JR., Members of the Board of Education; and DR. JOHN W. HARRIS, Superintendent of Schools; and their Agents, employees and successors, CIV78-4120.

Gentlemen: MEMORANDUM OPINION

A variety of Christmas assemblies has been presented in the Sioux Falls public schools for a number of years. During the Christmas season of 1977, two Sioux Falls

kindergarten classes rehearsed, memorized and then performed for parents a Christmas assembly which was replete with religious content including a responsive discourse between the teacher and the class entitled, "The Beginners Christmas Quiz." The "Quiz" consisted of the following:

Teacher: Of whom did heav'nly angels sing
And news about His birthday bring?

Class: Jesus.

Teacher: Now, can you name the little town
Where they the Baby Jesus found?

Class: Bethlehem.

Teacher: Where had they made a little bed
For Christ, the blessed Savior's head?

Class: In a manger in a cattle stall.

Teacher: What is the day we celebrate
As birthday of this One so great?

Class: Christmas.

A complaint about the program was made by one of the kindergartner's parents, Roger L. Florey, who is a party to this action.

In response to this complaint, as well as to complaints about Christmas assemblies which had been received in the past, Defendent Dr. John W. Harris, Superintendent of Schools, proposed that the School Board of Sioux Falls School District No. 49-5 (hereinafter School Board) set up a citizen's committee to study the issue of church and state in relationship to school district functions. A committee was formed early in 1978.

The committee developed a policy statement and rules[1/] in conjunction therewith and submitted them to the School Board. After public hearings were held, the School

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1/ The rules cited in this Opinion are contained in Appendix A, II, Rules, "Observance of Religious Holidays."

Board initially adopted the policy and rules set forth in Appendix A on November 13, 1978. The School Board finally adopted the policy and rules on December 4, 1978.

On November 30, 1978, Plaintiffs filed an action for declaratory and injunctive relief. Plaintiffs allege that the policy and rules adopted by the School Board violate the Establishment Clause of the First Amendment to the United States Constitution. In their prayer for declaratory relief, Plaintiffs ask this Court to declare that the policy and rules are unconstitutional and therefore void. Furthermore, in their prayer for injunctive relief, Plaintiffs ask this Court to enjoin the Defendants from enforcing the policy and from failing to instruct all public school officials in Sioux Falls that all Christmas assemblies must be absolutely and irrevocably secular.

This Court heard the evidence on the motion for the preliminary injunction on December 7, 1978. After the hearing, the parties agreed that the evidentiary hearing on the motion for the preliminary injunction could be consolidated with the trial on the merits of the case. The Plaintiffs presented three witnesses, all of whom are ordained clergymen. These individuals testified that the singing of Christmas songs which contained religious content, even when presented in a secular, non-devotional setting, constitutes a religious exercise. These witnesses testified that the objective content of songs such as "Silent Night" does not change even though the purpose in singing the song or in listening to the song might vary.

The evidence presented by the Defendants focused on the inherent musical value of Christmas songs having religious texts.

For instance, the Supervisor of Music for the Sioux Falls School system testified that Christmas songs with religious content were taught and performed for purposes of providing students with a complete musical education. Defendants' witnesses testified that the simple studying of Christmas songs with religious content in a classroom setting would not provide the student with a complete musical education because an integral part of studying music is performing music. Defendants' witnesses did not agree with Plaintiffs' witnesses that the singing of Christmas songs with religious content at a school Christmas assembly ipso facto constituted a religious exercise or activity. Defendants acknowledged that the kindergarten program which was presented in 1977 would not be permitted under the policy and rules developed and adopted in 1978.

Defendants further testified that the school programs for the 1978 Christmas season had been prepared to conform with the policy and rules set forth in Appendix A. Consequently, Defendants argued, the granting of the preliminary injunctive relief sought by Plaintiffs would work a great hardship upon the Defendants.

After hearing the evidence and considering the briefs, this Court denied Plaintiffs' motion for a preliminary injunction. This denial was based on the fact that the traditional criteria for granting preliminary injunctive relief had not been satisfied. Because Defendants had relied upon the policy and rules in preparing for the 1978 Christmas assemblies, this Court found that the potential hardship to the Defendants in granting Plaintiffs' motion for a preliminary injunction was greater than any hardship occasioned by the Plaintiffs should the preliminary

injunction not issue. Furthermore, the Court found that the threat of irreparable harm to the Plaintiffs should the Defendants not be preliminarily enjoined as Plaintiffs had requested was small. The Court also found that the probability of Plaintiffs' success on the merits was not so great that the burden which would be imposed on the Defendants by the granting of a preliminary injunction, at the height of the Christmas season and in the midst of the presentation of Christmas school assemblies, would be justified. Finally, the Court concluded that the granting of Plaintiffs' motion for a preliminary injunction in the middle of the Christmas season would not be in the public interest. This Court specifically reserved its rulings upon Plaintiffs' requests for a permanent injunction and for declaratory relief.

This Court therefore has before it the merits of this case: whether the policy and rules adopted by the Sioux Falls School Board violate the Establishment Clause of the First Amendment to the United States Constitution.

The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion...." The clause was made applicable to the States by the Fourteenth Amendment, Cantwell v. Connecticut, 310 U.S. 296 (1940); Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943). There have been a multitude of cases which have construed this clause. Most of the cases have either involved the issues of (1) public financial aid to sectarian educational institutions or (2) the allowance of arguably religious exercises or activities in public educational institutions. From these cases, a

three-part test has emerged which is to be used in evaluating cases arising under the Establishment Clause. The test was articulated by Chief Justice Burger in Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971), as follows:

> First the (activity) must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the (activity) must not foster "an excessive government entanglement with religion." (Citations omitted.)

In order for a challenged practice to pass constitutional muster, each part of the test must be met.

The case before this Court is one of first impression and one which presents an extremely close question of law. If the policy and rules adopted by the Sioux Falls Board of Education allow the schools to involve themselves in religious activities and exercises as a part of the observance

of the Christmas holidays, the policy and rules cannot stand. If, however, the rules adopted and the programs and treatment of religious subjects which occur pursuant to the rules do not constitute inherently religious activities, then the policy and rules can withstand constitutional attack.

It should be noted at the outset that this Court finds that the kindergarten program presented in 1977 which was quoted in this opinion was a predominantly religious activity. That particular program exceeded the boundaries of what is constitutionally permissible under the Establishment Clause. The new policy and rules, however, properly administered, would not permit the presentation of such a program because the treatment of religious subjects in that instance was neither prudent nor objective.

This Court is aware that there has been animated and forceful public response to

this lawsuit. A great percentage of the people who have responded against Plaintiffs' cause of action have argued that the public schools should be allowed to promote the Christian religion. Although a large segment of the public is apparently unaware of the fact, such a view is contrary to the decisions of the United States Supreme Court in the seminal cases of Engel v. Vitale, 370 U.S. 421 (1962), and School District of Abington Tp., Pa. v. Schempp, 374 U.S. 203 (1963). If the policy and rules are to withstand constitutional attack, it will not be for the reasons which many letter writers are urging. The Romans, at one time in world history, threw Christians to the lions! This was tragic, but the Romans were able to do this because they had the power to do so and they outnumbered the Christians. By the same token, numerical superiority of Christians should never be the basis for advancing the

Christian religion and inhibiting other religions in our schools.

In School District of Abington Tp., Pa. v. Schempp, supra, 222, the United States Supreme Court articulated the first two segments of the three-part test to be employed in the analysis of causes of action arising under the Establishment Clause of the First Amendment to the United States Constitution. The high court stated:

> The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

The precise activity under scrutiny in the Abington case was state action requiring that schools begin each day with a Bible reading, without comment. The Court determined that although secular purposes were

undoubtedly served by this practice, the primary purpose and effect were to advance religion.

In the case at bar, Plaintiffs maintain that just as assuredly as the prayer composed by the Board of Regents and recited by New York students in Engel v. Vitale, supra, and the recitation of Bible verses in School District of Abington Tp., Pa. v. Schempp, supra, constituted religious activities, so the policy and rules implemented by the Sioux Falls Board of Education allow the public schools in Sioux Falls to be engaged in religious activities. They specifically argue that Rules 1, 3, and 4, which are set forth in Appendix A, exceed the boundaries of what is constitutionally permissible under the Establishment Clause. This Court cannot so find.

First of all, Plaintiffs have simply

mischaracterized Rule 1.[2/] The rule makes it abundantly clear that schools in the Sioux Falls School District may observe holidays which have both a religious and a secular significance. This rule appears to distinguish between holidays with a purely religious significance, such as Pentecost, Ash Wednesday and Good Friday, which may not be observed in the public schools, and those holidays such as Christmas and Easter, with both a religious and secular basis, which may be observed. Rule 1 cannot be determinative of this action. Because of this Court's finding on Rule 1, Plaintiffs' argument that Rule 1 is unconstitutionally overbroad need not be considered.

[2/] The several holidays throughout the year which have a religious and a secular basis may be observed in the public schools.

Plaintiffs also strenuously object to Rules 3 and 4 as allowing the schools to engage in inherently religious activities. While Plaintiffs agree that students may study various religions and holidays in the public schools, they argue that permitting schools to present Christmas assemblies which contain songs with religious content goes beyond the realm of study and involves the schools in the impermissible activity of promoting the Christian religion. Similarly, they argue, Rule 4 allows the schools to involve themselves in inherently religious activities. The purpose and effect of these two rules, they maintain, is to promote the Christian religion.

Rule 3 does not permit the schools to engage in impermissible religious activities. Rather, Rule 3 seeks to ensure that schools may present holiday assemblies which contain religious art, literature or music as long

as such materials are presented in a prudent manner. The rule recognizes that much of our artistic tradition has a religious origin. Religious texts are frequently used in Christmas music. Much of this art, while religious in origin, has acquired a significance which is no longer confined to the religious sphere of life. It has become integrated into our national culture and heritage. To allow students only to study and not to perform such works when they have developed an independent secular and artistic significance would give students a truncated view of our culture.

Justice Jackson made the following observations which are pertinent to the legal problem which is now before this Court in his concurring opinion in People of State of Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County, Ill., et al., 333 U.S. 203, 236 (1948). He stated:

> Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view....The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity--both Catholic and Protestant--and other faiths accepted by a large part of the world's peoples. (Emphasis added.)

To rule unconstitutional a policy which allows Christmas assemblies to contain material having religious significance if such material is presented in a prudent and objective manner would leave the schools in the position of only being permitted to present programs that are eccentric and incomplete.

The purpose of the policy and rules is to expose and involve the student in the full spectrum of our Western musical tradition. Music is selected for its inherent musical value. Performance is an intrinsic

part of a musical education. The testimony presented by Defendant Peterson and Defendant Harris also revealed that the purpose in formulating and adopting the policy and rules was to guide school personnel in charting a constitutionally valid course in this sensitive area.

This Court cannot begin to gauge the effect that the presentation of school Christmas assemblies containing some material with religious content will have on persons of various persuasions and religious predilections. The Plaintiffs' witnesses have indicated that the presentation of materials having religious content at a school Christmas assembly would constitute a religious experience or activity in their minds. This Court is of the firm belief that if materials with religious content were presented to these same individuals in the classroom in a totally secular

manner, they would still attach a similar religious meaning to them.

The United States Supreme Court has not diluted the standard of review so that we are forced to evaluate the effect of these materials on each and every individual. Rather, the policy, rules and programs presented in accordance therewith must be evaluated to determine if they have the primary effect of either advancing or inhibiting religion. See, e.g. McGowan v. Maryland, 366 U.S. 420 (1961), and School District of Abington Tp., Pa. v. Schempp, supra. Because Christmas music with religious content has been assimilated into our culture, this Court finds that the performance of Christmas music with religious content does not constitute a religious activity per se. The primary effect of presenting these materials at a school Christmas assembly in accordance with Rule 3 is not

to promote a religion. Therefore, Rule 3's primary effect is secular.

Likewise, Rule 4 does not permit the school to engage in constitutionally impermissible activities. The purpose of Rule 4 is to allow the display of religious symbols under certain circumstances. The rule states that the reason for such display is to show examples of the religious and cultural heritage of the holiday. Such symbols can only be on display temporarily. The purpose of the rule is clearly educational. The effect is not to promote a religion. Proper administration of the policy is the key here. This Court cannot be called upon to rule, item by item, upon the constitutionality of each and every act, of each and every class in each and every school. If the policy is properly executed, there will be no constitutional problem. If not, there will be a constitutional problem.

There are not enough courts in this whole land to police every situation which arises. To feel otherwise is sheer sophistry.

Declaring the policy and rules unconstitutional would also have the effect of demonstrating a hostility toward religion. As Justice Douglas stated in Zorach v. Clauson, 343 U.S. 306, 314 (1952):

> [W]e find no constitutional requirement which makes it necessary for govermnet to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

The Supreme Court has set forth this principle in numerous cases, including Everson v. Board of Education of Ewing Tp., 330 U.S. 1, 18 (1957), and Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973).

Defendants object to any analysis of the policy and rules under the third part of the three part test, i.e. excessive entanglement. Defendants argue that cases

such as Lemon v. Kurtzman, supra, in which the three-part test was developed, are factually distinguishable from the case at bar. While the cases are distinguishable this Court simply does not agree with Defendants' analysis. We do not see any reason not to employ the test. In Committee for Public Education and Religious Liberty v. Nyquist, supra, 772-773, the United States Supreme Court made this observation:

> [T]he now well-defined three-part test that has emerged from our decisions is a product of considerations derived from the full sweep of the Establishment Clause cases. Taken together, these decisions dictate that to pass muster under the Establishment Clause the law in question...third, must avoid excessive government entanglement with religion. (Emphasis added.)

At least one circuit court of appeals has analyzed a case arising under the Establishment Clause and Engel v. Vitale, supra, and its progeny, under all three parts of the Lemon test. See, Meltzer v. Board of

Public Instruction of Orange Cty., 548 F.2d 559 (5th Cir. 1977), rehearing en banc, 577 F.2d 311 (5th Cir. 1978). The policy and rules must be evaluated under each part of the test.

The entanglement test was articulated by the United States Supreme Court in Lemon v. Kurtzman, supra, 614-615:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.

It is highly speculative to assert that benefit will accrue to any religious institution or religon through the policy and rules adopted by the Sioux Falls Board of Education and the programs presented in conformance with those rules.

Furthermore, this Court cannot find that the school system provides any aid to

religion or to any religious institution through its policy and rules. Any aid which the school system provides to religion through the implementation of its policy and rules could also easily be provided by objective study of religion and religious art in the classroom. It is true that an individual's religious sensibilities might possibly be kindled by participating in a school Christmas assembly in which songs with religious texts are sung. It is also possible that religion might be equally "promoted" when a Christmas song with a religious text is studied objectively in the classroom. The school cannot guarantee that exposure to various religions and religious ideas will not aid religion in some cases. Similarly, the school cannot guarantee that the type of exposure and participation allowed by Rules 3 and 4 will not benefit, in some fashion or other, any

religious institution by the acquisition of a convert. The type of "aid" which the policy and rules might afford is not the variety which a Court should or can attempt to control. Finally, this Court finds that the policy, rules and the implementation thereof do not result in any particular relationship between the school and any religious authority.

In conclusion, Plaintiffs' request for relief, asking this Court to declare Defendants' policy and rules unconstitutional and void, will be denied.

Further, Plaintiffs' prayer for a permanent injunction against Defendants from enforcing the said policy and rules will be denied.

The foregoing shall constitute the Court's Findings of Fact and Conclusions of Law.

BY THE COURT:

_____

ANDREW W. BOGUE, JUDGE
UNITED STATES DISTRICT COURT

[Appendix A, which contains the Guidelines, is omitted. The Guidelines are reprinted in the Opinion of the Court of Appeals, supra, at A 31.]

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1277

September Term, 1979

ROGER R.FLOREY, on his own behalf and on behalf of his minor son, Justin B. Florey; David R. Groethe; Marilyn Day; Evelyn Griesse; and Marilyn Fusfield,

Appellants,

vs.

SOUIX FALLS SCHOOL DISTRICT 49-5; Richard L. Bohy, President of the Board of Education; Doris Larson, David Brandt, Pam Nelson and John Simko, Jr., Members of the Board of Education and Dr. John W. Harris, Superintendent of Schools and their agents, employees and successors,

Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA

THIS CAUSE came on to be heard on the original designated record of the United

States District Court for the District of South Dakota and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed in accordance with the opinion of this Court.

April 22, 1980

Costs taxed in favor of Appellees;

Costs of reproducing six copies of brief: $49.00

Total costs of Appellees for recovery from Appellants in the U.S. District Court: $49.00

A true copy: Robert D. St Vrain
Clerk, U.S Court of Appeals,
8th Circuit.

Attest: Linda Landwehr
Deputy Clerk

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

79-1277

September Term, 1979

ROGER R. FLOREY, etc., et al.,

Appellants,

vs.

SOUIX FALLS SCHOOL DISTRICT 49-5, et. al.,

Appellees.

Appeal from the United States District Court for the District of South Dakota

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petiiton for rehearing and suggestions for rehearing en banc denied.

Judges Lay, Bright, McMillian and Arnold would grant the petition.

May 20, 1980

No. 80-502

Supreme Court, U.S.
FILED
OCT 18 1980
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1980

ROGER R. FLOREY, on his own behalf and on behalf of his minor son, JUSTIN B. FLOREY: DAVID R. GROETHE, MARILYN DAY, EVELYN GRIESSE, and MARILYN FUSFIELD,

Petitioners,

v.

SIOUX FALLS SCHOOL DISTRICT 49-5; RICHARD L. BOHY, President of the Board of Education; DORIS LARSON, DAVID BRANDT, PAM NELSON and JOHN SIMKO, JR., Members of the Board of Education and DR. JOHN W. HARRIS, Superintendent of Schools and their agents, employees and successors,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents respectfully submit this Brief in Opposition to the Petition for Certiorari previously filed on behalf of Roger R. Florey, Justin B. Florey, David R. Groethe, Marilyn Day, Evelyn Griesse, and Marilyn Fusfield. Pursuant to Rule 34.2, the following will not be included herein:

A list of parties to the proceeding;

Citations to the opinions and judgments in the court below;

A concise statement of the grounds upon which the jurisdiction of the Court is involved; and

The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves.

QUESTIONS PRESENTED FOR REVIEW

1. Whether school district rules which permit the use of educational materials containing some religious content, and which permit the observance of holidays which have a religious and a secular basis, violate the Establishment Clause of the First Amendment to the United States Constitution.

2. Whether those rules, as applied, unconstitutionally favor and establish religion over non-religion, or one religion over others.

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STATEMENT OF THE CASE

Petitioners' statement of the decisions below, jurisdiction, and constitutional provisions and school district rules is sufficient. Respondents feel compelled, however, to restate the facts of the case, for the manner in which the policy and rules at issue[1/] were promulgated and the context in which they were adopted is crucial to the disposition of this petition.

In December of 1977, Justin Florey participated in a kindergarten Christmas

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1/The policy and rules in question are accurately reprinted in Appendix A of the District Court's memorandum opinion, and, in pertinent part, in the Petition for Certiorari, and will not be stated at length. See Florey v. Sioux Falls School District 49-5, 464 F.Supp. 911, 918-919 (D.S.D. 1979) (hereinafter cited as Florey).

program which his father, Roger Florey, felt had excessive religious content. At that time the Sioux Falls school district had no written policy on the subject. As a result of a complaint made by Mr. Florey, Dr. Harris, the superintendent of schools, recommended that a citizens' committee be formed to aid in the development of policy and rules concerning the relationship between religious beliefs and school functions. The membership of this committee included, among others, the school district's director of music, an attorney, Jewish, Catholic and Protestant clergy, and a member of the American Civil Liberties Union. Tr. 77-78.

The citizens' committee deliberated for several months, seeking to develop

guidelines to aid the school district in complying with constitutional mandates regarding the relationship between public schools and religion. Tr. 78. After study by the school board and full, public hearing, the policy and rules recommended by the committee were officially adopted. Tr. 79-80.

In anticipation of final approval, school district personnel had implemented the policy for Christmas programs held in 1978. Tr. 80-81. Program formats were forwarded by the teachers to the director of music for review of their compliance with the guidelines. In only two instances was further consultation with the music staff or building principal deemed desirable. Tr. 81. Far from revealing any conscious or unconscious attempt to

indoctrinate, the programs reflect a desire to select easily recognized, innovative, or entertaining materials. Tr. 82-84. The programs consisted primarily of secular holiday music. Also included were some traditional Christmas carols. Exhibit 2.

From the outset, school district personnel recognized the need to conduct programs in such a manner that the inclusion of music and material from a religious background or with religious elements would not result in programs promoting any religious belief or nonbelief. Tr. 57-58, 75, 85, 97. Despite Petitioners' assertions to the contrary, it was never the purpose or intent of the school district to authorize or promote a program with religious effect. Tr. 69-70, 82. The

actual purpose and intent of the guidelines is best set forth in the policy itself:

> It is accepted that no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged.

At the evidentiary hearing conducted on December 7, 1978, Petitioners' case-in-chief consisted primarily of the introduction of evidence concerning the impact certain components of school Christmas programs might have on three individuals. None of these individuals was a student or former student in the Sioux Falls schools, or a music educator; rather, all were members of the clergy, of various faiths. Tr. 14, 25 and 36. More significantly, the record does not even reflect that any of Petitioners' witnesses had ever

attended a program such as is at issue here, although one witness said he thought he would. Tr. 47. Each testified, however, that certain Christmas music would be a religious experience for him. Tr. 15, 29 and 37.

Pastor Oliver explained his determination that such music was religious on the basis of his faith, Tr. 16, the fact that a song in question appeared in his hymn book, Tr. 17, and, importantly, the broad scope of experiences which he would consider religious. Tr. 19. Pastor Oliver freely admitted that his interpretation was not based on any experience in the public schools, Tr. 20, and further conceded that music with religious elements is often performed in secular settings. Tr. 21-23.

Martin Brokenleg conveyed a substantially different reaction to music with religious elements, but this too was based upon very personal elements of his faith. Tr. 29. Reverend Brokenleg specifically recognized that both the purpose and effect of the music would depend upon the setting in which such songs are sung. Tr. 31.

Finally, Petitioners presented the testimony of Professor Thomas Johnson. Although stating that songs such as "Silent Night" could have a religious purpose for him or his children, Tr. 39, 40, Professor Johnson limited his remarks to the "content" of such songs, Tr. 38, 39, and conceded that his view of such music was based upon his personal religious convictions. Tr. 40. Professor Johnson also agreed that some

songs containing religious references have a place in American culture and should be studied in the public schools. Tr. 41. He would apparently require that all music to be performed in the public schools be screened for offensively religious content. Tr. 47.

In contrast to the evidence adduced by Petitioners, Respondents squarely confronted the issues of purpose, effect and entanglement. Respondents' witnesses consisted of the administrators charged with supervising the Christmas programs, Dr. Harris and Donald Peterson; a former student who had recently attended schools in the district, Susan McGowan; and a musicologist who had been a student in the district, Ray Loftesness.

Mr. Peterson, the school district's

music education director, is a music educator of substantial experience and training. Tr. 76-77. He testified that Christmas programs in the district are not presented as religious experiences, Tr. 82, 89, but rather to "present a program musically genuine in its content and for the musical values thereof." Tr. 85. It was his opinion that the music involved in the district's programs complied with, and was necessary to meet the mandates of proper music education, Tr. 85-86, without regard to religious or non-religious content. Tr. 86, 88-89. Dr. Harris indicated that this complied with the policy of the district as adopted. Tr. 97-98.

Ray Loftesness had attended the Sioux Falls public schools, majored in

music in college, devoted forty years to radio broadcasting of quality music, and worked in the field of professional music for six years. Tr. 100. He has been a choral director, public relations director, and advance manager for Fred Waring. He did a great deal of musical research for Mr. Waring, Tr. 102, and is recognized as a musicologist (one who studies the performance, background and manner of composition of musical selections). Tr. 103. Mr. Loftesness revealed that Christmas carols were, in fact, a form of folk music in their inception, and were originally felt to be too secular for use by churches. Tr. 104-105. While conceding that such music might contain religious meaning for some on a personal basis, Tr. 110, he explained that the genesis of such

music is rooted more in culture and tradition than in organized religion. Tr. 106.

The usual manner of presentation and content of Christmas and choral programs in the district was addressed by Susan Henkin McGowan, a former student, of Jewish heritage. Tr. 112. It was her testimony that Christmas choral programs were presented for their artistic, educational and entertainment values, and not as religious celebrations. Tr. 113-114. Directly addressing the question of the music's purpose and effect, Ms. McGowan stated that her performance of a musical selection with Christian elements stemmed from artistic involvement, and did not reflect religious belief or require any statement of faith. Tr. 113-114. She valued the

opportunity she was given to gain poise, presence and maturity from musical performances in the public school program. Tr. 115. To her, the place of performance and the context in which words were spoken or sung were significant factors in determining the impact of the music on performer and audience alike. Tr. 114-115, 117.

Petitioners have carefully culled certain portions of the programs presented pursuant to the guidelines, for inclusion in the Petition for Certiorari. We hasten to point out the distorted view this gives of the actual content of the programs. For instance, the Emerson School program contained, in addition to the materials noted by Petitioners, plays entitled "12 O'Clock in the Toy Shop", "The Magic of the

Sugar Plum Fairy", and "The Christmas Card Maker"; and songs such as "Winter Wonderland", "Deck The Halls With Boughs of Holly", and "Let It Snow". The "debate" Petitioners refer to at page 10 and 11 of their Petition is not a debate as to who played the most important role at Jesus' birth. Rather, it is a mock trial as to which of the "Christmas Symbol Family" is the most important, a debate whose participants include "Jolly Old St. Nicholas", holly, and Chanukah candles. In a like manner, Petitioners would have the court believe that "almost half" of the songs performed at Garfield Elementary School were Christmas hymns, when, in fact, no more than five of the fifteen songs performed could even be characterized as containing any religious reference. Exhibit 2.

SUMMARY OF ARGUMENT

The tripartite test for reviewing alleged violations of the Establishment Clause of the First Amendment is well established, but it is applied on a case-by-case basis. The record in this case reveals not only a failure by Petitioners to prove their allegations, but an affirmative proof by Respondents of compliance with relevant constitutional standards.

The purpose of the challenged rules is to permit the use of the broadest range of educational material, while aiding district personnel in avoiding First Amendment controversies. The history of their promulgation and their actual wording make this clear. Petitioners fail to show any reason for reversing the decisions which uphold

the rules and the purpose they serve.

In order to show that the primary effect of activities conducted pursuant to the rules was either to advance or inhibit religion, and thus establish facial unconstitutionality, Petitioners would have had to show aid given to an overwhelmingly sectarian institution, or activities whose purpose could not be other than religious. Failing that, Petitioners would have had to prove an impact on the religious sensitivities of participants in, or observers of, the challenged activities. None of these propositions are supported by adequate proof in this case.

The place, manner of use, and context of use of the challenged programs and materials all bear upon the effect which results. The only testimony

adduced from participants or actual observers shows no impact on religious belief.

Respondents urge that the "excessive entanglement" prong of the tripartite test is of tenuous applicability in this type of case. The schools of the Sioux Falls district do not possess the attributes which led to formulation of that portion of the constitutional standard. Absent such characteristics, Petitioners are left to complain of a function which district personnel continually carry out -- the monitoring of curriculum.

Finally, Petitioners' arguments, if accepted, would lead public schools to assume a position of hostility toward religion. Such a position is not mandated by the Establishment Clause, and

would constitute a violation of the wholesome neutrality affirmatively required by the First Amendment.

REASONS FOR DENYING THE WRIT

A. The Case Does Not Merit Review.

Petitioners urge that the lower courts which decided this case misconceived the difference between "teaching about" and "observing" religion. In fact, this critical distinction was exhaustively analyzed by both lower courts, resulting in decisions which give proper significance to that distinction. The Petitioners' misconception in this case is of the proof necessary to support the claimed violation of the First Amendment. Had the Petitioners been able to prove a violation of the tripartite standard, we have little

doubt the challenged rules would have been stricken. Such a violation was not proved, and the evidence will not improve with presentation to this Court.

Petitioners raise the specter of "widespread adoption" of the challenged rules. We respectfully urge that the use of court-approved guidelines in such an uncertain area by two school districts in the entire country hardly constitutes contagion. More likely, the developments noted by Petitioners represent the continuing efforts by local boards of education to deal with First Amendment issues at the local level. The decisions by the lower courts in this case show a proper awareness of the need to validate such efforts when relevant constitutional criteria have been met.

The district court and court of appeals fairly considered and exhaustively analyzed all of the arguments raised by Petitioners. The resulting decisions comport entirely with First Amendment standards derived from prior decisions of this court. For the reasons stated, certiorari review is not warranted.

B. The Court Below Properly Applied the Tripartite Test, Consistent with Prior Decisions of this Court.

Governmental activities which have a secular purpose, which do not have the primary effect of advancing or inhibiting religion, and which do not excessively entangle government with religion, comply with the provisions of the First Amendment. The terms are carefully chosen and must be carefully

applied, for it is not every conceivable purpose or effect which is at issue, but only the "primary" purpose or effect; nor is it any incidental entanglement which may invalidate governmental activity, but only excessive entanglement.

The rules at issue here were carefully prepared to aid school personnel in complying with a policy statement which accurately reflects those constitutional criteria:

> It is accepted that no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged.

On their face, and in their application, the policy and rules were intended to, and do aid school district personnel in maintaining the neutrality required of public bodies in religious matters.

1. Secular Purpose

Despite Petitioners' unsupported allegations to the contrary, the purpose of the challenged rules is to establish guidelines for use by school district personnel in complying with the dictates of the First Amendment. At the same time, the rules permit the use of the broadest range of materials to achieve valid educational goals as determined by professional educators.

Petitioners contend that the purpose of the rules is to permit celebration of the religious aspects of Christian holidays. An examination of the wording and history of the rules reveals the error of this position. While no purely religious holiday may be "observed", those religious holidays which also have a secular basis may be

"observed", in compliance with the other rules.

Without benefit of supporting evidence, Petitioners allege that the Respondents' true motive for promulgating the rules is other than as set forth in the policy statement. The courts have not readily accepted such claims, and a good faith statement of secular purpose is generally found to be sufficient to meet the first prong of the tripartite test. See Committee for Public Education and Religious Liberty v. Regan, ___ U.S. ___, ____, 100 S.Ct. 840, 847 (1980); Hunt v. McNair, 413 U.S. 734, 741 (1973).

The purpose of the rules, compliance with constitutional standards while permitting the use of the widest range of educational material, comports

entirely with the view first enunciated by Justice Jackson in McCollum v. Board of Education, 333 U.S. 203 (1948):

> I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, arthitecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. ... The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity - both Catholic and Protestant - and other faiths accepted by a large part of the world's peoples. 333 U.S. at 235-236. (Emphasis added).

Such use of materials which happen to have religious elements is much different than the use of prayer, scripture or symbolism in cases like Engel v. Vitale, 370 U.S. 421 (1962); School District of Abington Township v. Schempp, 374 U.S. 203 (1963); and Fox v. City of Los Angeles, 587 P.2d 663 (Cal. 1978). In each of the cited cases, the manner in which the material in question was used made it clear that there could be no purpose other than a religious one.

2. Primary Effect[2/]

The Petitioners have, at pages 36

2/Petitioners raise, for the first time, at pages 33 and 34 of the Petition, some argument concerning equal treatment of various religions. Since this issue has not heretofore been raised, argued, briefed or decided, we will not address it here.

and 37 of the Petition, engaged in a fanciful semantic exercise in an attempt to avoid the clear statement of this prong of the tripartite test. This Court has consistently held that it is only activities whose "primary effect" advances or inhibits religion which are barred by the Establishment Clause. An incidental or de minimis impact upon religion will not invalidate the questioned activity. Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 747 (1976).

In order to assess the primary effect of the programs at issue here, the place, manner and context of performance must be considered. As Judge Adams, concurring in Malnak v. Yogi, 592 F.2d 197 (3rd Cir. 1979) accurately observed:

> The actual wording of a school exercise, for example, may be far less important than its context and purpose. A textual analysis might well invalidate the pledge of allegiance, the singing of "America the Beautiful," or the performance of certain works from Handel or Bach by a school glee club. Yet, such activities have not been held to violate the establishment clause, even though they include references to a God or a Supreme Being, because they are undertaken for patriotic, cultural or other secular reasons, and neither have, nor are intended to have, a religious effect on those participating in or witnessing them. These exercises, in other words, are not "prayers" within the meaning of Engel or Schempp. 592 F.2d at 202, n. 7.

Separating the text of the materials from the place and manner of their use cannot give an accurate view of the primary effect of the materials.

In harmonizing the "parochiaid" cases with the "school prayer" cases, it becomes clear that one of two factors

must be established to support a finding that the "primary effect" test has been violated: either the aid involved must flow to an institution so overwhelmingly sectarian in its mission and activities that the likelihood of religious advancement is virtually inescapable or the activity itself must be of such obvious religious nature that religion is necessarily advanced.[3/] It cannot be seriously contended that the Sioux Falls public schools are sectarian in their mission or activities. Thus, the issue becomes one of characterizing the nature of the materials in the context of their use, based upon the evidence presented to the district court.

3/Hunt, supra, 413 U.S. at 743; Schempp, supra, 374 U.S. at 223-224.

Petitioners have repeatedly sought to base that characterization upon their own self-serving conclusions, although those conclusions find no evidentiary support in the record. Absent such support, Petitioners must fail, and have failed in each of the courts below, for the burden of proof rests with them. Hunt v. McNair, 413 U.S. 734, 746 n. 8 (1973); Board of Education v. Allen, 392 U.S. 236, 243, 245, 248 (1968).

Petitioners claim that the three ministers who testified on their behalf, stated that "for their children, the school's observances were undistinguishable from church services." Review of the record will reveal that these witnesses testified as to the impact certain materials would have on them,

as ministers, but Petitioners introduced no testimony from students or former students. The impact on those clergymen has little, if any, relevance on the question of primary effect. Gaines v. Anderson, 421 F.Supp. 337, 342, n.6 (D. Mass. 1976).

3. Excessive Entanglement

Respondents do not contend that the third prong of the tripartite standard, whether the activity in question excessively entangles government with religion, does not apply to cases of this type. We do maintain, however that its application is difficult because of the sources from which it is derived, the so-called "parochiaid" cases.

The most significant factor in the formulation of the excessive entanglement

test, via the "parochiaid" cases, was the character of the institution benefiting from the challenged program. In Committee for Public Education and Religious Liberty v. Regan, ___ U.S. ___, 100 S.Ct. 840 (1980), this Court recently characterized the basis for its earlier decision in Meek v. Pittenger, 421 U.S. 349 (1975) as follows:

> The Court ruled that in "religion-pervasive" institutions, secular and religious education are so "inextricably intertwined" that "[s]ubstantial aid to the educational function of such schools ... necessarily results in aid for the sectarian school enterprise as a whole" and hence amounts to a forbidden establishment of religion. ___ U.S. at ___, 100 S.Ct. at 846.

This recognition comports with the rationale of the first case to enunciate the excessive entanglement test, Lemon v. Kurtzman, 403 U.S. 602 (1971), wherein

Chief Justice Burger carefully delineated no less than seven factors which led to the conclusion that aid given to sectarian schools, even though the aid itself was secular in nature, must necessarily advance religion. See Lemon, supra, 403 U.S. at 615, 617. None of those factors apply to the public schools in Sioux Falls, South Dakota.

Petitioners suggest that the enforcement of the rule and policy will constitute entanglement per se. This argument ignores the fact that the professional personnel of the district normally conduct a continuing review of curricular materials to delete outdated, irrelevant, obscene or unconstitutional materials. As was noted in Board of Education v. Allen, 392 U.S. 236 (1968):

> Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law. 392 U.S. at 245.

A holiday program, like any program, can and should be reviewed to insure its compliance with educational policy and constitutional mandates. The same applies to books, movies, or any other learning aid. Justice Jackson's warning against requiring the courts to sit as a "super board of education"[4/] is nowhere more apt.

4/McCollum, supra, 333 U.S. at 237.

C. The Petitioners Failed to Submit Proof of a First Amendment Violation.

The Petitioners urge that the rules are unconstitutional as applied, and complain that both lower courts failed to resolve that question. Even a cursory review of the record discloses that it would have been a very difficult issue to resolve based on the meager evidence produced by Petitioners. Petitioners gratuitously characterize the programs as "pervasively religious", freely insert their own opinions of literary merit in lieu of the testimony of professionals, and conclude that it is "inconceivable" that a creche might be used for secular instruction during a two or three day period. None of these arguments were even addressed by Petitioners' witnesses and the record

provides no other support for them.

In terms of proof, one of the most critical aspects of any Establishment Clause case is the primary effect test, for it must be proven that the primary effect upon those who participate in or witness the challenged activity is to advance or inhibit religion. See Board of Education v. Allen, 392 U.S. 236, 248 (1968). This burden rested with Petitioners because there exists "a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society." Palmer v. Board of Education of the City of Chicago, 603 F.2d 1271, 1274 (7th Cir. 1979)

Petitioners presented no testimony from any person who described the effect of the challenged programs on him or his

children. Rather, they have relied upon the testimony of three ministers whose religious background led them to conclude that some of the songs used were tantamount to prayer. Such testimony is not binding upon the school district or any court,[5/] and was directly refuted by a former student of the district who participated in such programs. Tr. 114-115, 117.

Petitioners have set forth selected parts of plays or songs constituting a portion of some programs which were presented. They ignore, however, the fact that 239 of 279 songs utilized were completely secular in nature. Further, they presented absolutely no testimony

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5/Gaines v. Anderson, 421 F.Supp. 337, 342 n. 6 (D. Mass. 1976).

to the effect that an observer of, or participant in one of these programs felt that religion had been advanced or inhibited. Although Petitioners claim that the "self-serving protestations of good intentions" contained in the general policy statement do not rebut the allegation of impermissible purpose, the record reflects a bona fide effort to provide district personnel with a tool to insure total compliance with the First Amendment. There is a complete failure of proof on the Petitioners' part.

D. The School District's Policy and Rules Comply with the Doctrine of Accommodating Neutrality.

At least since Zorach v. Clauson, 343 U.S. 306 (1952), this Court has noted the corrolary requirement of the First Amendment, that the state not be hostile

toward established religions. As Justice Douglas stated:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with the religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and

> sectarian education or use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. 343 U.S. at 313-314.

The cases are uniform in eschewing any intent or obligation to create hostility to religion.[6/]

It is the very nature of our society that religious considerations will make their presence felt in the schools.

6/See Everson v. Board of Education, 330 U.S. 1, 18, (1947); McCollum, supra, 333 U.S. at 211-212, Engel, supra, 370 U.S. at 433-434; Epperson v. Arkansas, 393 U.S. 97, 103-104 (1968); Walz v. Tax Commission of the City of New York, 397 U.S. 664, 668-670 (1970); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973).

As this Court noted in Roemer v. Board of Public Works of Maryland:

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required. 426 U.S. at 745-746.

It is clear that Petitioners seek this unattainable, hermetic separation. To reach such a point, however, the school district would be forced to exhibit a hostility toward organized religion which is not required by the First Amendment.

The rules comply with the key

features of accommodating neutrality. They recognize the necessary exposure of students in our society to elements of various religions; they allow the use of materials with religious elements to achieve valid educational goals; and they provide guidelines for the use of district personnel in making an objective evaluation of their programs. Thus, both aspects of accommodating neutrality -- the prohibition against hostility to religion, and the proper use of materials with religious elements to achieve secular educational goals -- are preserved.

CONCLUSION

Both the trial court and the Eighth Circuit Court of Appeals, after careful deliberation, correctly decided the

issues before them. The petition for a writ of certiorari to review those judgments should be denied.

Respectfully submitted,

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Dated:
Sioux Falls, South Dakota
October 17, 1980

No. 80-502

NOV 3 1980

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

ROGER R. FLOREY, on his own behalf and on behalf of his minor son, JUSTIN B. FLOREY; DAVID R. GROETHE, MARILYN DAY, EVELYN GRIESSE, and MARILYN FUSFIELD,

Petitioners,

v.

SIOUX FALLS SCHOOL DISTRICT 49-5; RICHARD L. BOHY, President of the Board of Education; DORIS LARSON, DAVID BRANDT, PAM NELSON and JOHN SIMKO, JR., Members of the Board of Education and DR. JOHN W. HARRIS, Superintendent of Schools and their agents, employees and successors,

Respondents.

REPLY BRIEF

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Argument

Petitioners file this Reply in order to correct misstatements of fact made in Respondents' Brief in Opposition (hereinafter Respondents' Brief).

Respondents claim (Respondents' Brief at 4) that "the /holiday/ programs consisted primarily of secular holiday music and /a/lso included some traditional Christmas carols." This attempt to portray the programs as containing only isolated religious elements is not an accurate description of those programs, as we explain in detail in the Petition for Certiorari pp. 7-11; 23-25. As the record plainly demonstrates, Respondents' Christmas programs contained substantial religious elements, including songs, plays and allegories. Every one of Respondents' Christmas programs emphasized the religious significance of Christmas, either through

drama or song. But in any event, this case does not turn on whether programs consist primarily or only substantially of religious elements. Even if the holiday observances contained only substantial religious elements, Petitioners submit their performance in the public schools, as part of the observance of a religious holiday, violates the Establishment Clause.

Second, Respondents claim (Respondents' Brief at 5) that "Petitioners' case-in-chief consisted primarily of the introduction of evidence concerning the impact certain components of school Christmas programs might have on three individuals" who were not students, and therefore that there was a failure of proof of an effect of advancing religion. This is also untrue. To begin with,

plaintiffs introduced, by stipulation, the holiday programs of all but two or three of the Sioux Falls public schools. Second, the testimony as to the existence of this effect was not at all tentative. Plaintiff Roger Florey testified (by affidavit) that the Christmas programs being conducted in his son's public school had an impermissible religious effect on him and his son. (Affidavit of Roger Florey, appended to the complaint). Two other parents testified similarly with respect to their children. One of these parents considers school Christmas programs to be "a sacrilege" and refuses to allow his six-year-old son to participate in them. Tr. 27-29. The other parent, who has three children in the school system, testified that, as a devout Christian, he objected to public schools' activities

designed "to reinforce the faith of my family." Tr. 39-40, 44.

Respondent's own witnesses also conceded that the school Christmas programs had a religious effect on people in attendance. The School District's Music Director acknowledged that, for persons attending the Christmas programs, the singing of Christmas carols would have the same effect as their singing in a church. Tr. 93. The Superintendent of Schools agreed. Tr. 73-75. Ray Loftesness, Respondents' musicologist, admitted that school Christmas programs containing religious songs will have a religious effect because "you can't escape what the words say." Tr. 110. Susan Henkin McGowan, Respondents' other witness, agreed. Tr. 116-17. A great deal of evidence was introduced, then, to show that public

school Christmas programs have a religious effect, either pro or con, on people who attend or perform in them. Indeed, not a single witness denied the existence of this religious effect.

Moreover, several of the complainants sued in their capacities as taxpayers. The fact that these programs had a significant sectarian component, and used tax funds to place the imprimatur of the school system on religion, had the effect of using tax moneys to advance religion. Thus, even disregarding the religious effect those practices had on school children, the programs had the effect of advancing religion in a manner forbidden by the Establishment Clause.

When all is said and done, certain facts are uncontested. In 1978, second grade students in a Sioux Falls public

school performed a play which instructed these students that "the Babe in the manger is a gift to the world;" a first grade class performed a play in which they tried to decide what gifts to bring Jesus on His birthday; other first grade students performed a play in which they debated the question of who played the most important role at Jesus' birth. Either these activities, fully documented in the record, violate the Establishment Clause or they do not. The court below saw no Establishment Clause violation. Petitioners ask this Court to review that judgment.

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